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NORTH CAROLINA
ATTORNEY GENERAL REPORTS

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UFUS L. EDMISTEN
TTORNEY GENERAL

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NORTH CAROLINA ATTORNEY GENERAL REPORTS

Opinions of the Attorney General
July 1, 1978 through December 31, 1978

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5 July 1978

Subject: Motor Vehicles; Chauffeur's License

Requested by: Toni Foxwell
Transportation Planning Section
Department of Transportation

Question: Does North Carolina law require volunteer operators, operating their own vehicle of less than nine passenger capacity, transporting elderly citizens to nutrition sites, to hold a chauffeur's license if such owner/operator is reimbursed once for mileage at the rate of 15 cents per mile?

Conclusion: No, reimbursement at the rate of 15 cents per mile would not be transporting persons or property for compensation.

The generally accepted reimbursement rate is 15 cents per mile for a private passenger vehicle and, as such, is considered reimbursement for actual costs. Under the requirements for chauffeur's license, reimbursement for actual costs would not fall within the definition "... transportation of persons or property for compensation." In our opinion, such reimbursement would not be for compensation.

Rufus Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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5 July 1978

Subject: Mental Health; Area Mental Health Authorities; Licenses and Licensing; Requirement for licensing of Local Mental Health Facilities

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Requested by: R. J. Bickel
Deputy Director for Administration
Division of Mental Health and Mental Retardation Services

Question: Under current statutes dealing with Area Mental Health Authorities are the following required to be licensed:

(A) Satellite units of an Area Mental Health Authority?

(B) Agencies with which the Area Mental Health Authority contracts for services statutorily required of the Area Mental Health Authority?

Conclusion: The entities described in both (A) and (B) above are required to obtain licenses.

This Office has previously issued an opinion dealing with the licensing of various types of local mental health facilities. See 45 N.C.A.G. 51 (1975). Since the date of that prior opinion, however, the statutory basis for Area Mental Health Programs and Area Mental Health Authorities has been completely rewritten. The answers to the questions posed here are now found in Article 2F, Chapter 122 and G.S. 143B-147a(2)e.

G.S. 122-35.51, effective July 1, 1977, provides as follows:

> "An area mental health facility operated under the provisions of Chapter 122 of the General Statutes shall obtain a license permitting such operation. Subject to standards governing the operation and licensing of these facilities set by the Commission for Mental Health and Mental Retardation Services, the Department of Human Resources shall be responsible for issuing licenses."

An "Area Mental Health Facility" is defined by G.S. 122-35.36(3) in the following language:

"(3) Area Mental Health Facility. - A mental health facility, public or private, established to serve the needs of a designated catchment area in mental health, mental retardation, or substance abuse."

Significantly, G.S. 143B-147a(2)e authorizes and requires the Commission for Mental Health and Mental Retardation Services to establish standards and adopt rules and regulations for the licensing of all area or community mental health facilities "of whatsoever nature" pursuant to Article 2F of Chapter 122.

As a result of the above-described provisions, it is clearly the intent of the General Assembly that all units and service-providing agencies to the Area Mental Health Authorities be licensed by the Department of Human Resources utilizing standards, rules and regulations promulgated by the Commission for Mental Health and Mental Retardation Services.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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5 July 1978

Subject: Education; Superintendent; Duration of contract of employment of new superintendent where vacancy occurs in the office of superintendent.

Requested by: John W. Hardy, Attorney for the Guilford County Board of Education

Question: Where the superintendent resigns before the end of his contract period, or a vacancy occurs in the superintendency for whatever reason, may the Board of Education extend to the new superintendent a two or four year contract?

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Conclusion: Yes. Where a vacancy occurs in the office of the superintendent, the vacancy may be filled on a temporary basis, or it may be filled for a specific two or four year period.

The former superintendent of the Guilford County schools submitted his resignation effective June 30, 1978, with one year remaining on his contract. The question arises whether the new superintendent may be hired for a two or four year term, or is the Board restricted to offering the new superintendent a contract of only one year, which is the period remaining on the former superintendent's contract.

G.S. 115-55 provides in pertinent part:

> "In case of vacancy by death, resignation or otherwise in the office of a county or city superintendent, such vacancy shall be filled by the county or city board of education in which such vacancy appears."

G.S. 115-39 provides in pertinent part:

> "Such superintendent shall take office on the following July 1 and shall serve for a term of two or four years or until his successor is elected and qualified. The superintendent shall be elected for a term of either two or four years, which term shall be in the discretion of the county board of education."

Construing G.S. 115-39 and 115-55, particularly those portions of each statute above quoted, it would appear that the superintendent of a county school administrative unit shall serve a term of two or four years, or until his successor is elected and qualified, and that in choosing a successor the board of education has the discretion in electing the successor for either two or four years. To interpret these statutes in such a way that would restrict a board of education from contracting with a successor to a resigning superintendent for any period of time greater than the length of time remaining on his unexpired contract, would create a difficult situation in employing such a successor. For example, in the event a superintendent died while in office leaving six months on his

contract, one can readily see that a qualified person would be very reluctant to enter into a contract for six months without any assurance that he could obtain a new contract for either two or four years. It is our opinion that the language contained in either G.S. 115-39 or 115-55 does not require such an interpretation and in fact does give a board of education sufficient discretion to fill a vacancy with a new contract term of either two or four years.

The conclusion stated herein does not in any way affect or overturn an earlier opinion issued by this Office and reported in 40 N.C.A.G.R. 261, wherein it was concluded that a local board of education does not have the authority, with the superintendent's consent, to terminate the superintendent's current contract of employment prior to the specified termination date set out in the contract and to thereafter enter into a new contract of employment as superintendent with the same individual. The opinion rendered today deals only with a situation where a vacancy occurs in the office of superintendent and a new contract is entered into with an individual other than the previous superintendent.

Rufus L. Edmisten, Attorney General
Andrew A. Vanore, Jr.,
Senior Deputy Attorney General

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7 July 1978

Subject: Counties; Cities; Collection of Taxes; Interlocal Cooperation; G.S. 160A-460 et seq; G.S. 160A-146.

Requested by: Robert C. Cogswell, Jr.
City Attorney
City of Fayetteville

Question: May a city and the county in which it is situated enter into an interlocal undertaking under which the city agrees to designate the county tax collector as city tax collector?

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Conclusion: Yes.

Article 20 of Chapter 160A of the North Carolina General Statutes, entitled Interlocal Cooperation, authorizes any unit of local government (defined in G.S. 160A-460 to include cities and counties) to enter into an agreement with any other such unit or units for the purpose of carrying on an undertaking. G.S. 160A-460 defines an undertaking as

> "the joint exercise by two or more units of local government, or the contractual exercise by one unit for one or more other units, or any administrative or governmental power, function, public enterprise, right, privilege, or immunity of local government."

Since taxation is a governmental power and function, a contractual arrangement for the collection of taxes–including an agreement whereby one unit of local government designates another unit's tax collector as its own-would seem to be the very kind of interlocal undertaking contemplated by Article 20.

G.S. 160A-146, *Council to organize city government*, in no way defeats the conclusion that such an agreement is a proper one. G.S. 160A-146 relates only to the powers of the city council with respect to the allocation of duties within municipal government. It has no application to the matter of interlocal cooperation, which is governed exclusively by G.S. 160A-460 et seq. Moreover, even if G.S. 160A-146 were applicable, it would not be violated by the agreement in question. The office of city tax collector is not abolished by the agreement, nor are the duties of the city tax collector assigned elsewhere. The position continues to exist; it is simply occupied by an individual who happens also to serve as county tax collector.

Rufus L. Edmisten, Attorney General
Marilyn R. Rich
Associate Attorney

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24 July 1978

Subject: Insurance; Tax on group insurance premiums; group insurance procured by North Carolina Farm Bureau agents through a North Carolina Farm Bureau insurance agency from an Illinois agency and holder of a group policy issued by a California insurance company.

Requested by: John R. Ingram
Commissioner of Insurance

Question: Are premiums collected from various insureds in state by a North Carolina insurance agency and remitted out of state for group insurance issued by an insurance company that is not licensed in North Carolina subject to a 5% premium tax imposed by G.S. 58-53.3?

Conclusion: Yes.

Sequoia Insurance Company (hereafter Sequoia), a California corporation that is not licensed to sell insurance in North Carolina, has issued an "Errors and Omissions" master group policy (No. EL 20-10-11) to American Agricultural Insurance Agency, Inc. (hereafter AAIAI. AAIAI is an Illinois corporation and is not licensed in North Carolina. In turn, AAIAI issues certificates of insurance to, among others, 100 and more North Carolina Farm Bureau agencies. Premiums for such insurance are paid annually by each county agency to the North Carolina Farm Bureau Insurance Agency, Inc. (hereafter N. C. Agency). When all premiums for each covered agency or agency have been collected, the N. C. Agency forwards its single check for the premiums to AAIAI. AAIAI responds by issuing renewal certificates to the covered agents or agencies. No payment is made by anyone to the State of North Carolina as a tax on the premiums.

G.S. 58-53.3 requires that:

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> "When any person procures insurance on any risk located in this state with an insurance company not licensed to do business in this state, it shall be the duty of such person to deduct from the premium charged on the policy or policies for such insurance five per centum (5%) of the premium and remit same to the Commissioner of Insurance of the state...."

There are several statutory requirements for tax liability: (1) The tax is imposed on a person. G.S. 58-2(7) defines a person as "an individual, aggregation of individuals, corporation, company, association and partnership." The N. C. Agency comes within the statutory definition of person. (2) There must be a procurement. The N. C. Agency collects the premium money, accounts for it, administers to the program statewide, and forwards the gross premium to AAIAI for the commodity. A 5% brokerage commission is withheld from gross premiums by the N. C. Agency for its services. Upon receipt of the premium from the N. C. Agency, AAIAI issues the several certificates of insurance to the county agencies. These actions of the N. C. Agency clearly constitute a procurement. (3) Insurance must be procured. There is no controversy but that the certificates issued by AAIAI under the Sequoia master policy constitute insurance. (4) The insurance must cover a risk located in this state. Here the risk is to protect against liability from errors and omissions of several hundred agents in the performance of their jobs at 100 and more locations in the state. It is quite likely that the potential risk is exclusively within the geographic limits of North Carolina. Consequently the risk is located within North Carolina. (5) The insurance company must not be licensed in North Carolina. Again there is no controversy. Sequoia is an insurance company and is not licensed to do business in North Carolina.

Each of the statutory requirements is met. Under the statute, the N. C. Agency has a duty to deduct 5% of the gross premiums and remit same to the Commissioner of Insurance. Failure of the N. C. Agency to deduct and remit that percentage would constitute a violation of G.S. 58-53.3.

Counsel for Sequoia cites several cases to the effect that levy of the tax would constitute a deprivation of federal constitutional

rights. *State Bd. of Insurance v. Todd Shipyards Corp.*, 82 S.Ct. 1380 (1962); *Connecticut General Life Ins. Co. v. Johnson*, 58 S.Ct. 436 (1938); *St. Louis Cotton Compress Co. v. State of Arkansas*, 43 S.Ct. 125 (1922); *Alleger v. State of Louisiana*, 17 S.Ct. 427 (1897). Those cases are distinguishable because no tax is sought to be levied against Sequoia. Moreover, the insurance is against errors and omissions. Claims would be made by North Carolina residents on North Carolina transactions. Claims would have to be adjusted and settled in North Carolina.

Additionally, the 100 or more N. C. County Farm Bureaus, (the insureds) deal with the N. C. Agency to obtain the insurance and make payment of annual premiums within the state to that same corporation. Thus, a substantial portion of the recurring negotiation for the insurance occurs in North Carolina. The totality of those transactions between the local agencies and the N. C. Agency are intrastate in nature. These activities are not slight and casual as in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 78 LEd. 1178 (1934) but are substantial as in *Clay v. Sun Ins. Office*, 377 U.S. 179, 12 LEd. 2d 229 (1964). These facts are sufficient to provide North Carolina with a substantial nexus for the tax purposes. See *Texas v. New Jersey*, 379 U.S. 674, 13 LEd. 2d 596, 85 S.Ct. 626 (1965).

Rufus L. Edmisten, Attorney General
Richard L. Griffin
Assistant Attorney General

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31 July 1978

Subject: Mental Health; Area Mental Health Authorities; Patients' Rights Entitlement Where Services Are On A Contractual Basis

Requested by: R. J. Bickel
Deputy Director for Administration
Division of Mental Health and Mental Retardation Services

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Question: Do the provisions of G.S. 122-55.1 through G.S. 122-55.14 apply to services provided for an Area Mental Health Authority (by a general hospital, etc.) on a contractual basis?

Conclusion: Yes.

The statutes referred to in the question posed are part of the "Patients' Rights Bill" enacted by the General Assembly to afford statutory protection for "basic human rights" of mental patients in our treatment facilities. See G.S. 122-55.1 and G.S. 122-55.13. G.S. 122-36(g) contains the following general definition of the term "treatment facility":

> "(g) The words 'treatment facility' shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina."

A similar definition of the term "treatment facility" as utilized in the voluntary admission provisions is set forth in G.S. 122-56.2.

G.S. 122-35.49 permits an Area Mental Health Authority to contract for services statutorily required of it, subject to the following conditions:

> "The area mental health authority may contract with other public or private agencies, institutions, or resources for the provision of services, but it shall be the responsibility of the area mental health authority to insure that such contracted services meet the rules and regulations as set by the Commission for Mental Health and Mental Retardation Services. Terms of the contract shall require the area mental health authority to monitor the contract to assure that minimum standards are met."

From the above, it is clear that patients served by an Area Mental Health Authority must be guaranteed the same rights whether they are served "in-house" or through a contract with a general hospital or other such facility. This is clearly the intent of the statutes. Further, the failure to guarantee these same rights regardless of where services are rendered would probably raise a serious question under the Equal Protection Clauses of the North Carolina Constitution and the Constitution of the United States.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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2 August 1978

Subject: Public Offices, Constitutional Law; Double Office Holding; Counties, Municipalities; Police Officer Elected as County Commissioner, Article VI, Section 9, North Carolina Constitution; G.S. 160A-284; G.S. 128-1.1.

Requested by: Paul S. Messick, Jr.
Town Attorney

Question: May a town policeman hold concurrently an elective office?

Conclusion: No.

Article VI, Section 9 of the North Carolina Constitution provides that no person shall hold concurrently any two or more appointive offices or any combination of elective and appointive offices except as the General Assembly shall provide by general law.

Thus without specific authority from the General Assembly, no person could hold an elective and appointive office concurrently.

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On June 30, 1971, the General Assembly enacted Chapter 697, Session Laws of 1971 which contained G.S. 128-1.1, and which authorizes "any person who holds an elective office in State or local government to hold concurrently one other appointive office ... in State or local government ...".

Also, on June 30, 1971, the General Assembly enacted Chapter 698, Session Laws of 1971, which contained G.S. 160A-284, and which authorizes a policeman, a chief of police and auxiliary policemen to hold concurrently any other *appointive* office pursuant to Article VI, Section 9 of the Constitution. In 1975, G.S. 160A-284 was amended to permit an auxiliary policeman to hold concurrently any elective office.

Statutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each. Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general terms, the particular statute controls unless it appears that the General Assembly intended to make the general act controlling. 12 Strong's N.C. Index 3d, Statutes, Sec. 5.

Applying the rules of statutory construction, and the rule of ascertaining the legislative intent, it is our opinion that G.S. 160A-284 is the controlling statute and that a policeman other than an auxiliary policeman, is not authorized to hold concurrently an elective office.

Thus should the person in question be elected to the office of County Commissioner, he would, upon acceptance of said office, be disqualified to serve as a municipal police officer.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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2 August 1978

Subject: Municipalities; Powell Bill Fund; Village of Pinehurst

Requested by: Joseph R. Monroe, Jr.
Attorney for Village of Pinehurst

Question: Is Pinehurst, Inc., a private real estate and development corporation which renders fire and police protection and maintains streets for the Village of Pinehurst, eligible to receive Powell Bill Funds (gasoline tax funds) under Section 5 of the provisions of Chapter 993 of the 1949 Session Laws?

Conclusion: No. The Village of Pinehurst is constituted a municipal corporation only for such purposes as are listed in Chapter 993 of the 1949 Session Laws and it cannot comply with the conditions of eligibility to receive Powell Bill Funds as it is not a municipal corporation for those purposes.

The gasoline tax funds appropriated to municipalities for use in the construction and maintenance of municipal streets are referred to as Powell Bill Funds. G.S. 136-41.1. The question is presented as to the right of Pinehurst, Inc. to receive Powell Bill Funds under the provisions of Section 5 of Chapter 993 of the 1949 Session Laws. Section 1 of the Act provides that "For all purposes of this Act, but *only for such purposes*" the area described constitutes "the municipal corporation to be known and hereafter referred to as Pinehurst".

Section 5 of the Act provides that "the municipality of Pinehurst as herein defined shall be entitled to all such refunds and moneys as are allowed or conferred upon towns and cities of the State" and "shall be entitled likewise to all such gasoline taxes on account of roads . . . that other cities and towns may be entitled to and to the same extent as if the said Pinehurst was a regularly incorporated town or city." A private corporation, Pinehurst, Inc.,

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developed the Village of Pinehurst and performs services such as the maintenance of roads and sidewalks, fire protection and police protection for some of its residents. The Act provides that inasmuch as "Pinehurst, Incorporated, . . . maintains and operates at its own expense all public streets and sidewalks in Pinehurst and furnishes at its own expense all the public facilities and utilities enjoyed by the public within said territory of Pinehurst, all such refunds, moneys or property as would be payable or belong to Pinehurst as a regular municipality under the provisions of this Act shall be paid and delivered to Pinehurst, Inc. to reimburse it for such expenditures in behalf of Pinehurst in its capacity as a municipal corporation."

G.S. 136-41.1 provides for the distribution of "Powell Bill Funds" "among the several *eligible* municipalities of the State." G.S. 136-41.2 contains the provisions for eligibility for receiving the funds. It provides that (a) no municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has conducted the most recent election required by its Charter or general law, whichever is applicable, for the purpose of electing the municipal officials. Subsection (b) provides that no municipality shall be eligible to receive funds under G.S. 136-41.1 unless it is levied an ad valorem tax for the current fiscal year of at least five-cents on the $100 valuation upon all taxable property within the corporate limits, and unless it has actually collected at least 50% of the total ad valorem taxes levied for the preceding fiscal year. Subsection (c) provides that no municipality shall be eligible to receive funds under 136-41.1 unless it has formally adopted a budget ordinance and appropriated funds for at least two municipal services.

Chapter 993 of the 1949 Session Laws constitutes the Village of Pinehurst as a municipal corporation only for the purposes listed in that Act. The purposes listed do not include any of the acts listed which are conditions for eligibility for receipt of Powell Bill Funds. It is not a municipal corporation for the purpose of (a) electing municipal officials; (b) the levying of an ad valorem tax; nor (c) the adoption of a budget ordinance. Therefore, this Office is of the opinion that Pinehurst, Inc. is not entitled to receive distribution of Powell Bill Funds.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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8 August 1978

Subject: Mental Health; Area Mental Health Authority; Involuntary Commitment; Temporary Custody of Respondent by Out-Patient Facility Pending Commitment Hearing

Requested by: R. J. Bickel
Assistant Administrator for Administration
Division of Mental Health and Mental Retardation Services

Question: Can a mental health facility without an in-patient capability legally accept a patient for temporary custody, observation and treatment prior to his involuntary commitment hearing in District Court as required by G.S. 122-58.7?

Conclusion: Yes, if that facility can meet the needs for control, safety, care and treatment of the individual patient involved.

G.S. 122-58.7 provides for a hearing to determine if a respondent should be involuntarily commited within ten days of the date that he is taken into custody. Initially, when an individual has been taken into custody, the respondent is taken before an evaluating physician who determines if he meets the standards for involuntary commitment. If the evaluating physician determines that the respondent does meet the standards for involuntary commitment, then the law enforcement officer is required to take the respondent to ". . . a community mental health facility or public or private facility designated or licensed by the Department of Human Resources for temporary custody, observation, and treatment of

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mentally ill or inebriate persons pending a District Court hearing." (G.S. 122-58.4(c))

Upon arrival at that facility, the respondent must then be examined by a second qualified physician for a determination of whether he meets the standards for involuntary commitment. If this physician finds that the respondent does meet the standards, ". . . he shall hold the respondent at the facility pending the District Court hearing." (G.S. 122-58.6(a))

The situation described in the question posed is quite different from that wherein either of the two physicians decides that the respondent does not meet the standards for involuntary commitment--i.e., in those situations the first physician may release the individual and the proceedings will terminate (G.S. 122-58.4(c)), and the second physician may release the respondent without any further treatment but with the proviso that he appear for his hearing (G.S. 122-58.6(a)).

From the description of the facility under discussion, it is obvious that it is not capable of accepting a patient in a twenty-four hour a day in-patient status. Thus, the answer to the question really turns on the interpretation of the words "custody, observation and treatment" (G.S. 122-58.4) and "hold" (G.S. 122-58.6). In so interpreting this language, the following expressed intention of the General Assembly must be considered:

> ". . . It is further the policy of the State that each treatment facility shall insure to each patient the right to live as normally as possible while receiving care and treatment." (G.S. 122-55.1)

Further, the General Assembly has specifically empowered the trial judge at the time of the commitment hearing to commit the respondent to either in-patient or out-patient treatment. (G.S. 122-58.8(b)). Additionally, in interpreting the statutory provisions, it is very important to recognize that it is presently generally accepted that an individaul who is involuntarily detained or committed as a mental patient has a constitutional entitlement to treatment in the least restrictive setting available, consistent with legitimate control, safety, care and treatment objectives.

The term "custody" would seem to have different meanings as applicable to different settings–e.g., a quite different situation is contemplated when referring to the imprisonment of a convicted prisoner from that involved in the custody of children. As affecting the detention involved of a mental patient prior to his hearing, the fulfillment of the requirement for custody would seem to be met if conditions are imposed which significantly confine or restrain the freedom or liberty of the individual if those measures are appropriate in that particular situation. Compare *Jones v. Cunningham*, 371 U.S. 236 (1963); *Calley v. Callaway*, C.A.Ga., 519 Fed. 2d 184 (1975).

G.S. 122-58.6 (c) authorizes the qualified physician attending the respondent to administer reasonable and appropriate medication and treatment that is consistent with accepted medical standards. It would seem that, in a situation where out-patient treatment, probably including medications, would suffice to meet the needs for control, safety, care and treatment under accepted medical standards, then the receipt of a respondent at a facility capable of rendering these services would be permissible.

As with the situations wherein the District Court judge at the commitment hearing directs out-patient treatment rather than in-patient treatment, it is perhaps conjectural exactly what percentage of respondents who meet the standard of "being imminently dangerous" can be satisfactorily handled as out-patients at such early stages of treatment. However, the determination of appropriateness of this mode of custody must be made on an ad hoc basis. It might also be noted that the delineation of facilities capable of being utilized as pre-hearing treatment facilities and the degree of services they are capable of rendering is properly a matter included in the local plans required by G.S. 122-58.16.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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10 August 1978

Subject: State Departments, Institutions and Agencies; Department of Transportation;

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Municipalities; Streets and Highways; Weight Limits; Special Permits

Requested by: Mr. F. Douglas Canty
Assistant City Attorney for Charlotte

Question: 1. Does the City of Charlotte have the authority to issue special permits authorizing the operation, over city-maintained streets, of passenger buses of a weight exceeding the maximum specified in G.S. 20-118(8)?

2. Does the North Carolina Department of Transportation have the authority to issue special permits authorizing the operation, over both state-maintained and city-maintained streets, of passenger buses of a weight exceeding the maximum specified in G.S. 20-118(8)?

Conclusion: 1. No. Although the municipality has authority under the provisions of G.S. 160A-296 and 300 to restrict and regulate traffic on municipal streets, including authority for the issuance of special permits for the purpose of the licensing of overweight passenger buses under the provisions of G.S. 20-118(8).

2. Yes. The Department of Transportation has the authority to issue special permits for overweight passenger buses in order that the applicant may obtain a license to operate the passenger bus on both the state-maintained and city-maintained streets pursuant to the provisions of G.S. 20-118(8).

The City of Charlotte has on order thirty-four new passenger buses for use by its public transit system, which, when fully loaded, will

exceed the statutory weight limits established by G.S. 20-118(8). G.S. 20-115 provides that the maximum size and weight of vehicles specified in the article shall be lawful throughout the State and local authorities shall have no power or authority to alter said limitations except as express authority shall be granted in this Article. The foregoing restriction raises the question of the authority of a municipality to grant special permits for the operation of overweight vehicles on municipal streets as G.S. 20-119 provides that municipalities may grant permits in writing authorizing the applicant to move a vehicle over the streets of the city or town, the *size or width* exceeding the maximum expressed in the article. We find no express authority in the Article for municipalities to alter the weight limitations nor to issue special permits for the operation of overweight vehicles on the streets.

The municipality has specific statutory authority to adopt such ordinances for the regulation and use of its streets as it deems best for the public welfare of its citizens and to provide for the regulation and diversion of vehicular traffic upon its streets. *Genes, Inc. v. Charlotte*, 259 N.C. 118, 120 (1963). G.S. 160A-296 provides that a city shall have general authority and control over all public streets which includes but is not limited to (1) the duty to keep public streets in proper repair; (5) the power to regulate the use of public streets. G.S. 160A-300 provides that a city may by ordinance prohibit, regulate, divert, control and limit pedestrian or vehicular traffic upon the public streets, sidewalks, alleys and bridges of the city. Unless otherwise restricted by State law, the municipality has the authority to regulate the weight of vehicles using its streets and to issue permits for the operation of overweight vehicles on municipal streets under the authority of those statutes. 75 ALR 2d 396 Anno. Highways - Weight Limitations.

The foregoing cited statutes authorizing municipalities to regulate streets and traffic have been in effect since 1919. Chapter 136, 1919 Session Laws. These statutes however were rewritten and reenacted in 1971. Chapter 968, 1971 Session Laws. G.S. 20-115 and G.S. 20-119 were originally passed 1927. At that time the language in the first sentence of G.S. 20-119 authorized local governments and the State Highway Commission to issue special permits for oversize or overweight vehicles. The 1927 Statute provided in part as follows:

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"The State Highway Commision *and local authorities in their respective jurisdiction* may in their discretion, upon application in writing and good cause being shown therefore, issue a special permit in writing authorizing the applicant to operate or move a vehicle of its size or weight exceeding the maximum specified in this Act upon any highway under the jurisdiction for the maintenance of which the body granting the permit is responsible." Chapter 148, Section 38, 1927 Session Laws.

However, after the county road system was taken over by the State Highway Commission, the 1937 Legislature rewrote the motor vehicle statutes. G.S. 20-119 was amended by deleting the foregoing underlined portion which authorized local governments to issue overweight permits. The purpose was apparently an attempt to reflect the change in the jurisdiction over county roads. The proviso as now appears was added, which provides that municipalities may issue special permits to move a vehicle over the streets of the municipalities may issue special permits to move a vehicle over the streets of the municipality, the *size or width* exceeding the maximum expressed in the Act. Chapter 407, Section 83, 1937 Session Laws. This left G.S. 20-115 somewhat ambiguous. The use of the term "size or width" in the proviso, rather than "size or weight" may also have been an oversight. An unsuccessful attempt was made in 1957 to clarify G.S. 20-119 by the passage of Chapter 1129 of the 1959 Session Laws. That session law is entitled "An act to clarify the issuance by the State Highway Commission of special permits for vehicles of excessive size or weight." It was still ambiguous after the amendment. A further review of the legislative history for the purpose of this opinion would serve no purpose except to show that G.S. 20-119 was ambiguous when rewritten in 1937 and is still ambiguous after an attempted clarification in 1959.

Municipalities have the duty and authority to maintain the Municipal Street System and the Department of Transportation has the duty and authority to maintain the State Highway System. G.S. 136-66.1. Both are given authority to regulate traffic and the use of public streets. The Department of Transportation is given express authority to (1) classify county roads as light traffic roads and to post those roads, G.S. 20-118(5); (2) to establish truck routes and to prohibit

trucks from using certain routes, G.S. 20-116(h), G.S. 20-141(i); (3) to issue special permits for overweight vehicles, G.S. 20-119; (4) and to restrict load limits on bridges on the State Highway System, G.S. 136-72. Express authority is not given to municipalities to limit the load limits on bridges, to post and restrict roads, to establish truck routes over municipal streets, nor to issue special permits for overweight vehicles. A review of the legislative history of the municipal laws and G.S. 20-119 and G.S. 20-116 does not indicate an intent to exclude municipal regulations in these areas. This Office has in the past advised that State law does not prohibit municipalities (1) from posting weight limits on bridges on the Municipal Street System; (2) from restricting trucks on certain streets to prevent damage or destruction by vehicles carrying the legal load limit; (3) and from establishing truck routes, so long as the regulations are reasonable. This Office is of the opinion that municipalities have authority to issue special permits for the movement of overweight vehicles over municipal streets, and that the issuance of such permits is not an alteration of the weight limits in contravention of G.S. 20-115. However, the municipality has no authority to issue such special permits for operation of overweight passenger buses for the reasons hereinafter discussed.

The licensing of "passenger buses" for operation on the highways of the State is handled differently from the licensing of other vehicles. A certification as to the weight of a passenger bus is required before it can be licensed to operate on the highways. Prior to the 1978 Amendment by the General Assembly, G.S. 20-118(8) prohibited the issuance of a special permit for the operation of a passenger bus exceeding the statutory weight limits. The 1977 General Assembly on June 16, 1978, amended G.S. 20-118(8) by repealing the prohibition against the issuance of overweight permits for passenger buses, and by providing that "Unless the applicant holds a special permit from the Department of Transportation, no license shall be issued to any passenger bus", for operation on the highways, which exceeds the weight limits specified therein. Chapter 1178, 1977 Session Laws. The license issued by the Commissioner of Motor Vehicles authorizes the operation of the "passenger bus" upon the highways of the State, including those maintained by the municipality. A permit from the Department of Transportation is a prerequisite for the licensing of "passenger buses", which will exceed the weight limits in G.S. 20-118(8). Therefore, this Office

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is of the opinion that the State has preempted the issuance of special permits for overweight passenger buses for the purpose of licensing under the provisions of G.S. 20-118(8).

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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14 August 1978

Subject: Employment Agency; G.S. 95-37 Definition includes a For Profit Business.

Requested by: Mr. John H. Boddie, Director
Private Employment Agency Division
N.C. Department of Labor

Question: Does the definition of employment agency in G.S. 95-37 include a for profit business that makes a charge on persons seeking employment for the service of providing them with information about employment opportunities, when:

(1) the business advertises specific positions of employment in the classified section of one or more newspapers of general circulation but tells job seekers the name of the employer offering an advertised position only after they pay a "subscription" charge;

(2) the business publishes no printed or written list of available jobs;

(3) the business disseminates no material or information other than information about employment opportunities; and

(4) persons who pay for the service are told about employment opportunities by means of telephone conversations with employees of the business and by no other means?

Conclusion: Yes.

Chapter 95, Article 5 of the General Statutes of North Carolina authorizes and empowers the North Carolina Department of Labor to license and regulate individuals and businesses engaged in the operation of an employment agency. G.S. 95-37 is hereinafter set forth verbatim:

> "§95-37. *Employment agency defined.*--Employment agency within the meaning of this Article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service."

To be classified as an employment agency, a business must be:

1. Operated for profit;

2. Engaged in procuring employment "for any person, firm or corporation in the State of North Carolina;" and

3. Charging the prospective employee or employer for the service.

The business described above clearly falls within the parameters of this statutory definition and is an employment agency within the meaning of G.S. 95-37.

Rufus L. Edmisten, Attorney General
George W. Lennon
Associate Attorney General

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23 August 1978

Subject:	Social Services; Welfare Fraud; Client Interviews; Warnings as to Constitutional Rights
Requested by:	Mr. Robert H. Ward, Director Division of Social Services
Question:	Must a social worker, before questioning a client in a suspected welfare fraud case, inform the client of his constitutional rights?
Conclusion:	No, so long as nothing about the questioning might reasonably cause the client to believe he was in custody or otherwise significantly deprived of his freedom.

The Fourteenth Amendment to the U.S. Constitution prohibits the use of a confession which is coerced, either by physical or mental means. *State v. Chamberlain*, 263 N.C. 406 (1965). "The test of admissibility of a confession is whether the statements made by the defendant were in fact voluntarily and understandingly made." *State v. Jones*, 278 N.C. 88 at 92 (1971). The state courts are bound by the United States Supreme Court's interpretation of the Fourteenth Amendment in *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires that to insure voluntariness a suspect be warned, prior to interrogation, of his Fifth and Sixth Amendment rights. The situation that triggers this requirement is a "custodial interrogation". *Id.* at 444. Prior to *Miranda*, the Court had seemed to hold that the decisive stage was reached when the investigation "had begun to focus on a particular suspect." *Escobedo v. Illinois*, 378 U.S. 478 at 490 (1964). But *Miranda* explicitly limited the requirement to "custodial interrogations", and the warnings have since been required only in such situations. *State v. Dollar*, 292 N.C. 344 (1977); *State v. Meadows*, 272 N.C. 327 (1968).

Our question now becomes: Is an interview by a social worker concerning suspected fraud a "custodial interrogation"? In *Miranda*

a custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". *Miranda v. Arizona*, 384 U.S. at 444. A client brought to the Department of Social Services for a normal interview of this type has not been arrested, restrained, or deprived of his freedom. He is free to leave, is not being questioned in a coercive atmosphere, and is not at a police station. There are no factors compelling involuntary testimony.

In accordance with this argument, the New Jersey Supreme Court has held that social workers need not give *Miranda* warnings during investigations of suspected fraud. *State v. Graves*, 60 N.J. 441 (1972). The Colorado Supreme Court arrived at the same conclusion, though it was not essential to the holding in that case. *People v. Parada*, 533 P.2d 1121 (Colo., 1975). Similarly, in a decision by the United States Supreme Court, an Internal Revenue Service special agent investigating potential criminal tax violations was not required to inform the suspect of his rights. *Beckwith v. United States*, 425 U.S. 341 (1976). The Supreme Court distinguished between the "focus of the investigation" test and the "custodial interrogation" test, and emphatically applied the latter. *Id.* at 345. In so doing, the Supreme Court affirmed decisions in nine of the Circuits including the Fourth Circuit. See, *United States v. Browney*, 421 F.2d 48 (4th Cir., 1970).

It should be remembered that the *Miranda*, warnings are merely a procedural device to ensure the voluntariness of a defendant's statement. Though they are not required in these interviews, any statement, to be admitted, must have been given voluntarily. It "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Brady v. United States*, 397 U.S. 742 at 753 (1970). Social workers should avoid such influences. See, *People v. Paranda, supra.*

Rufus L. Edmisten, Attorney General
Steven Mansfield Shaber
Associate Attorney

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29 August 1978

Subject: Health; Certificate of Need; Coverage of projects commenced before January 1, 1979; G.S. 131-170 *et seq.*

Requested by: Mr. Charles W. Houseworth, Jr., Health Planner, State Health Planning and Development Agency Department of Human Resources

Question: If work has commenced, but not completed by January 1, 1979, on a "new institutional health service" proposal and the proposal has not received approval under Section 1122 of the Social Security Act, 42 U.S.C.A. 1320a-1, is the person required to obtain a Certificate of Need pursuant to Chapter 1182, 1977 Session Laws (Second Session, 1978), (to be codified at G.S. 131-170 *et seq.*) before proceeding further with work on the proposal?

Conclusion: No, if prior to ratification of the Act he has proceeded with development of the new institutional health service as explained below.

The North Carolina Health Planning and Resource Development Act of 1978, ratified by the General Assembly on June 16, 1978, adds a new Article 18 to Chapter 131 of the General Statutes which requires that before a person undertakes, develops, or offers a new institutional health service he must obtain a Certificate of Need from the Department of Human Resources. Chapter 1182, 1977 Session Laws (Second Session, 1978). Section 4 of the Act provides that it will be effective January 1, 1979. In addition, Section 4 provides two exemptions from coverage: 1) those proposals which received approval for capital reimbursement under Section 1122 of the Social Security Act, 42 U.S.C.A., 1320a-1, prior to January 1, 1979, as long as construction commences before January 1, 1980; and 2)

those proposals for which application is made between July 1, 1978 and January 1, 1979 under the Section 1122 program, if the application is approved and if construction commences before January 1, 1980. The question at hand is whether a Certificate of Need is required for a proposal which does not qualify under the two exemptions and which is not completed by January 1, 1979.

A Certificate of Need "affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project." Section 131-171(3) of Section 2, Chapter 1182, 1977 Session Laws (Second Session 1978). The Act reveals that a Certificate of Need will be granted only to those proposals which the Department of Human Resources finds to be needed and in conformity with other standards and criteria as set forth in the Act and developed by the Department. Immediately prior to ratification a new institutional health service would be submitted to the Department of Human Resources for a finding of need only if the proponent desired reimbursement for capital expenditures under Titles V, XVIII, and XIX of the Social Security Act, 42 U.S.C.A. 1320A-1. The passage of the Act by the General Assembly imposes an entirely new limitation on the opportunity to proceed with the development of the new institutional health service.

If the Act is interpreted to require a Certificate of Need when prior to the ratification of the Act the proponent had already proceeded with development of the new institutional health service and incurred substantial expense the Act would invade personal and property rights protected under the Constitution of this State. See, *Whaley v. Lenoir County*, 5 N.C.App. 319 (1969). On the other hand, if the Act is interpreted so that it does not apply where a proponent, prior to ratification, had already proceeded with development of the new institutional health service such rights will be protected. The basic rules of statutory construction require the latter, if reasonable, as a statute will not be construed so as to raise questions as to its constitutionality if a different construction which will avoid such question of constitutionality is reasonable. *State Milk Commission v. National Food Stores, Inc.* 270 N.C. 323 (1967); *State v. Barber*, 180 N.C. 711 (1920). The definition of Certificate of Need reasonably supports a construction of the Statute which makes it inapplicable to someone who prior to ratification has

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already proceeded with development of the new institutional health service. As previously noted, the Certificate of Need allows the proponent to proceed with development. If the proponent had done so prior to ratification the Certificate of Need, by definition, would be unnecessary. Such a construction is also consistent with the provision that the certificate shall be valid only for the time specified by the Department of Human Resources, not to exceed 18 months, and that within such time the proponent must fulfill the specific performance requirements set forth in the Act for incurring a financial obligation. Section 131-174 (a) and (b) of Section 2, Chapter 1182, 1977 Session Laws (Second Session, 1978).

In order to be exempt from the Act, the proponent must have proceeded with development prior to ratification. Subsequent to June 16, 1978 and prior to January 1, 1979, the proponent may be protected only if he receives approval under Section 1122 of the Social Security Act, 42 U.S.C.A. 1320a-1, in accordance with Section 4 of the Act.

A person proceeds with development when he "undertake(s) those activities which will result in the offering of institutional health service not provided in the previous 12 month reporting period or the incurring of a financial obligation in relation to the offering of such a service." Section 131-171 (8) of Section 2, Chapter 1182, 1977 Session Laws (Second Session, 1978). Whether or not a person has undertaken such activities is a question of fact to be settled on a case-by-case method.

It should be noted that this opinion does not address the application of the Act to those who, subsequent to January 1, 1979, proceed with development of a new institutional health service without a Certificate of Need.

Rufus L. Edmisten, Attorney General
Robert L. Hillman
Associate Attorney General

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5 September 1978

Subject: Education; County Board of Education; Condition Subsequent; Undue Restraint Upon Right of Alienation

Requested by: Lucas, Rand, Rose, Meyer, Jones and Orcutt
Attorneys for the Wilson County Board of Education

Questions: (1) Whether the language contained in a deed to the Wilson County Board of Education (as it appears below), restricting the use of land for school purposes and giving to the grantor, his heirs or assigns the right to repurchase at a set price if said condition is breached, constitutes a condition subsequent?

(2) Whether said language, by attempting to vest a right to repurchase the subject property in the grantor, his heirs or assigns at a set price if the land is no longer used for school purposes, constitutes an undue restraint upon the right of alienation?

(3) Whether the heirs or assigns of the grantor may assert a valid contract to repurchase or may the School Board, if it chooses to dispose of the property, follow the public auction procedures of N.C.G.S. 115-126?

Conclusions: (1) No.

(2) Yes.

(3) The School Board may follow the public auction procedures of

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N.C.G.S. 115-126 if it should choose to dispose of the property.

The following facts have been provided: On 20 April, 1922, "H" and his wife, "W", did convey by warranty deed approximately five acres of land to Wilson County Board of Education. The consideration recited in the deed was $750. The following language appears in the deed after the metes and bounds description:

> "It is agreed by the County Board of Education that if this site is ever abandoned for school purposes that the site shall be offered for sale first to (the grantor) or his heirs or assigns at the purchase price herein named; then in case said (grantor) or his heirs or assigns do not care to purchase this school site at the price above named, then the County Board of Education may sell the same to any other person or persons at such price as they may consider reasonable and just."

As to Conclusion (1), the North Carolina courts have held that despite the other language used in an instrument, a condition subsequent is not created unless the grantor *expressly* reserves the right to re-enter, or provides for a forfeiture or for a reversion, or that the instrument shall be null and void. *First Presbyterian Church v. Sinclair Refining Company*, 200 NC 469 (1931); *Lassiter v. Jones*, 215 NC 298 (1939). The clause in question here fails to reserve any of these rights in the grantor, his heirs or assigns. It instead attempts to reserve an option to repurchase the land upon the discontinued use of the land for school purposes and at the price of $750. Thus, it would seem that technically such a clause falls short of creating a fee simple or condition subsequent. As is pointed out in Webster, *Real Estate Law in North Carolina*, §345, p. 434 (1971) "(v)ery clear language of condition, indicating that title is subject to revert upon the occurence of a specified event, must be used. While express language of reverter is not required, anything less may cause the court to construe the language to create simply a covenant, charge or trust, or to be mere surplusage".

As to Conclusion (2), the general rule seems to be that there is a policy in favor of the free alienation of land. As a result, any

provision in a conveyance which unduly restricts the right of transfer of the title in any way has been held to be void. Webster, *Real Estate Law in North Carolina*, §346(f)(2) (1971).

The North Carolina court was faced with a similar fact situation in the case of *Hardy v. Galloway*, 111 NC 519 (1892). There the deed that was conveyed provided that upon a decision by the grantee to sell, the grantor would have the first change to repurchase. There was no reservation as to the exact time for the performance of the provision or for the price that was to be paid. The court held that the restriction to reconvey to the grantor upon a decision to sell the property not only was void for uncertainty in fixing no price for the repurchase and no time for the performance of the provision, but also as an unlawful restraint upon alienation. The Court stated that:

> "(t)he restriction is certainly inconsistent with the ownership of the fee as well, it would seem, as against public policy... In other words, we have an estate in fee without the power to dispose of or encumber it, unless first offering it for no definite price to the grantors, their heirs and assigns. The condition is repugnant to the grant, and therefore void." 111 NC at 524.

The principle of *Hardy v. Galloway* was reaffirmed by the Court of Appeals in *Jenkins v. Coombs*, 21 NC App. 683 (1974).

The first situation here is similar to the *Hardy* case in that there is no definite time set for the performance of the option to repurchase. Although there is a set price, there is precedent that a fixed price set below the present fair-market value is also an undue restraint on the fee simple estate and should be held void. Simes, *The Law of Future Interest*, §114 (2d Ed. 1966).

Since there is no condition subsequent created by the language in question (as is discussed under Conclusion (1)), the opinion of this Office is that the attempt to create an option to repurchase the property in the grantor, his heirs or assigns at a set price upon the condition that the land is no longer used for estate granted. Not only is there no set time that such an option will remain open but

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also there is a set price that would fall substantially below the present fair-market value of the land.

As to Conclusion (3), it would be suggested that the grantor's heirs or assigns be notified as to any actions taken by the School Board, but it would be the opinion of this Office that there is no obligation encumbent upon the Wilson County School Board to offer the land in question to the grantor's heirs or assigns should the School Board decide to no longer use said land for school purposes (for the above stated reasons). The School Board may proceed to dispose of the property if it so chooses by the normal public auction procedures of North Carolina General Statute 115-126.

Rufus L. Edmisten, Attorney General
T. Buie Costen
Special Deputy Attorney General

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15 September 1978

Subject: Health, Chiropractors; Access to X-Rays In Possession of Hospitals

Requested by: The Honorable Ramey F. Kemp
Member of The House of Representatives
North Carolina General Assembly

Question: Under current statutes may a chiropractor review the diagnostic X-ray records of his patient when such records are in the possession of a hospital which receives aid or support from the public?

Conclusion: Yes.

As amended by the 1977 General Assembly, G.S. 90-153 provided as follows:

> "A licensed chiropractor in this State may have access to and practice chiropractic in any hospital or

sanitarium in this State that received aid or support from the public, *and shall have access to diagnostic X-ray records and laboratory records relating to the chiropractor's patient.*" (Emphasis Supplied)

This statute clearly authorizes a chiropractor to review the records described in the question, which such entitlement including access to the X-rays themselves. It would seem that the intent of the General Assembly in enacting this legislation was threefold: (a) to obviate unnecessary costs in the delivery of health care; (b) to prevent unnecessary explosure of patients to radiation; and (c) to enable chiropractors to engage fully in the practice of chiropractic.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General
Robert R. Reilly
Assistant Attorney General

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18 September 1978

Subject: Administration of Estates; Probate of Wills

Requested by: Honorable Carl G. Smith
Clerk of Superior Court
Iredell County

Questions: (1) May a will be admitted to probate where it includes a certificate executed in the form prescribed by N.C.G.S. §31-11.6 (relating to self-proved wills), but where no separate attestation was made?

(2) If the answer to question (1) is no, may the witnesses who signed the certificate later go before the court and attest the will and thereby have the will admitted to probate?

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Conclusions: (1) No.

(2) No.

N.C.G.S. §31-11.6 (Supp. 1977) provides that:

> An attested written will executed as provided by G.S. 31-3.3 may at the time of its execution or at any subsequent date be made self-proved by the acknowledgement thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this state, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows....

The certificate is set out in the statute. It states, in part, that the testator declared that he had signed the will and executed it in the presence of the witnesses or acknowledged his signature to them. The witnesses make a similar declaration. Space is provided for the signatures of the testator, witnesses and acknowledging officer. The statute then provides that "The sworn statement of any such witnesses taken as herein provided shall be accepted by the court as if it had been taken before such court."

The purpose of this provision is to allow for the ante-mortem proof of a written attested will. It simply provides an alternative method of probate to the others set out in N.C. G.S. 31-11.6 does not in any respect displace of amend the requirements of N.C. G.S. 31-3.3 governing attestation of wills. *See, e.g., In Re Estate of Kavcic*, 341 So.2d 278 (Fla. App.1977). The whole thrust of the statute contemplates a will that has already been attested by the testator and witnesses. This is self-evident from the language of the certificate which requires a declaration by the testator and witnesses that they *had* signed the will.

It is interesting to note that Section 2-504 of the Uniform Probate Code (U.L.A.) §2-504 (1977) read substantially like N.C. G.S. 31-11.6. However, Section 2-504 was amended (Supp.1978) to read, in part,

> (a) Any will may be simultaneously executed, attested, and made self proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths....

The comment to this amendment states that:

> (T)he original text (of this section) authorized only the addition to an already signed and witnessed will, of an acknowledgment of the testator and affidavits of the witnesses thereby requiring testator and witnesses to sign twice even though the entire execution ceremony occurred in the presence of a notary or other official.

If the will was not properly attested, the witnesses who signed the certificate may not later go before the court and attest the will and thereby have the will admitted to probate. Attestation must be made in accordance with N.C. G.S. 31-3.3 which requires that the witnesses sign *after* the testator and in his presence. *In re Thomas*, 111 N.C. 409,16 S.E.226 (1892).

This could obviously not be done if the testator had also failed to sign the will in accordance with N.C. G.S. 31-3.3.

Rufus L. Edmisten, Attorney General
Lucien Capone, III
Associate Attorney General

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22 September 1978

Subject: Social Services; North Carolina Grant under the Child Abuse Prevention and Treatment Act

Requested by: Carl H. Harper, Regional Attorney, Region IV, United States Department of Health, Education and Welfare

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Question: Is the definition of "sexual abuse" as set forth in the recent amendments to the Child Abuse Prevention and Treatment Act (42 U.S.C. §5101 *et seq.*, as amended by P.L. 95-266) encompassed within the definition of "abused child" as set forth in The North Carolina Child Abuse Reporting Law (G.S. 110-117) and the definition of "neglected child" as set forth in The North Carolina Juvenile Jurisdiction and Procedure Law (G.S. 7A-278(4))?

Conclusion: Yes.

This opinion is in response to a question posed by the Office of Regional Attorney, Region IV, United States Department of Health Education and Welfare in connection with the North Carolina grant under the Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101, *et seq.*). In April of 1977 the Act was amended to include "sexual exploitation" within the definition of "child abuse and neglect" (42 U.S.C. § 5102 as amended by Section 102(1) of Public Law 95-266). In addition, the term "sexual abuse" was defined as including:

> "... The obscene or pornographic photographing, filming, or depiction of children for commercial purposes, or the rape, molestation, incest, prostitution, or other such forms of sexual exploitation of children under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary (of HEW) ..."
>
> 42 U.S.C. § 5104 as amended by Section 104(2) of Public Law 95-266

The precise question raised by the Regional Attorney's Office is whether the definition of "abused child" as set forth in G.S. 110-117 (1) c. and the definition of "neglected child" under G.S. 7A-278(4) may be interpreted to include "sexual abuse or exploitation" as currently defined by the Child Abuse Prevention and Treatment Act.

Although G.S. 110-117(1) c. defines an "abused child" as "a child less than 18 years of age whose parent or other person responsible for his care commits or allows to be committed any sex act upon a child in violation of law," the preamble to this section states:

> "As used in this Article, *unless the contex otherwise requires*:" (Emphasis supplied)

It is our opinion that if sexual abuse or exploitation of children for commercial purposes does not fall squarely within the purview of G.S. 110-117(1)c., the preamble to said section would nonetheless bring it within the State law definition of "abused child."

Moreover, as we asserted in our prior opinion relative to the North Carolina application for a grant under the Child Abuse Prevention and Treatment Act (March 28, 1978), it has always been our position that abuse is implicitly encompassed within the definition of "neglected child" under G.S. 7A-278(4). This would still hold true now that we have concluded that sexual abuse or exploitation of children for commercial purposes is included within the definition of "abused child" under G.S. 110-117.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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5 October 1978

Subject: Motor Vehicles; On-street Parking; Prima Facie Rule of Evidence

Requested by: Mr. Miles B. Fowler, City Attorney
Clinton, N. C.

Question: May a city ordinance providing a penalty of more than One Dollar ($1.00) for overtime parking be enforced under the prima facie rule of evidence as provided in G.S. 20-162.1?

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Conclusion: No, G.S. 20-162.1 provides for a One Dollar ($1.00) penalty only.

If a penalty of more than One Dollar (1.00) is sought, the prima facie rule of evidence provided in G.S. 20-162.1 would not be applicable.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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6 October 1978

Subject: Antitrust; Real Estate Brokers and Agents.

Requested by: Blanton Little, Secretary-Treasurer
N. C. Real Estate Licensing Board

Question: May a local Board of Realtors, a private trade association, require a licensed real estate agent to become a member of the Board in order to be eligible to apply for membership in or association with a multiple listing service corporation established by the Board?

Conclusion: No, if the multiple listing service is found to be an essential competitive tool in the real estate market it serves.

Real estate brokering is a "trade" within the meaning of the federal and state antitrust laws. *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 LEd. 1007 (1950); *Love v. Pressley*, 34 N.C. App. App. 503, 239 S.E.2d 574 (1977). The business practices of real estate agents individually and jointly as members of a Board of Realtors are subject to antitrust enforcement.

Unreasonable restraints of trade are prohibited by G.S. 75-1 and 75-2, and § 1 of the Sherman Act. Where members of a trade band together for the purpose of advancing business interests the antitrust laws condemn group activities which restrain trade. The law prohibits businessmen from becoming associates in a common plan which has the purpose and effect of reducing their competitors' opportunity to buy or sell the things in which the groups compete. *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 LEd. 2013 (1945).

In *Associated Press*, the court held that where a facility created by a combination of competitors became essential to effective competition in a particular market such that exclusion from membership in that facility placed an enterprise at a competitive disadvantage, exclusion was unlawful under the Sherman Act. This is true even if competing facilities exist or even if competition has not been completely prevented by the presence of the facility. See also *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950); *Gamco, Inc. v. Providence Fruit and Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

Denial of access to the listings of a multiple listing service reduces the "opportunity to buy or sell the things in which the groups compete" of non-members. Where a multiple listing service established by a Board of Realtors has become so dominant an economic force in a particular market that exclusion from membership places a broker at a competitive disadvantage, exclusion is unlawful under federal and state antitrust laws. It is not enough that Board membership is open to any licensed real estate agent. *United States v. Terminal R.R. Association of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 LEd. 810 (1912).

While your question has not been litigated in North Carolina, other jurisdictions have held that conditioning membership in a multiple listing service on membership in the Board of Realtors is an unreasonable restraint of trade. The court in *Marin County Board of Realtors v. Palsson*, 130 Cal. Rptr. 1, 549 P.2d 833, 843 (1976), said:

> An association's freedom to exclude non-members from its activities is not absolute. It must yield to

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antitrust laws when (1) its activities begin to correspond directly with and touch upon the business activities of its members; and (2) the association has the power to shape and influence the economic environment of its particular market.

The court held that for non-members to compete effectively access must be granted to all licensed real estate agents who choose to use the service. Accord, *Pomanowski v. Monmouth County Bd. of Realtors*, 152 N.J. Super. 100, 377 A.2d 791 (1977); *Oates v. Eastern Bergen County Multiple List. Serv., Inc.*, 133 N.J. Super. 371, 273 A.2d 795 (1971); but see, *Barrows v. Grand Rapids Real Estate Bd.*, 51 Mich. App. 75, 214 N.W.2d 532 (1974) (exclusion of non-members of real estate board from multiple listing service upheld where non-members were substantially able to complete and majority of sales in the area were not made through the service). Thus, where the multiple listing service is a vital competitive tool, requiring membership in the Board of Realtors is a violation of G.S. 75-1 and §1 of the Sherman Act.

G.S. 75-2 prohibits any act in restraint of trade which violates the common law. Predicating MLS participation on Board membership where access to the multiple is an economic competitive necessity violates common law principles. See *Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (1973) (exclusion of non-members from multiple listing service held *per se* common law restraint of trade); *Grillo v. Bd. of Realtors of Plainfield Area*, 91 N.J. Super. 202, 219 A.2d 635 (1966) (denial of access to non-members found to be unreasonable restraint of trade under common law principles).

Rufus L. Edmisten, Attorney General
Tiare Smiley Farris
Associate Attorney General

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20 October 1978

Subject: Health; Immunization; Exclusion of Students from School under G.S. 130-90

Requested by: Dr. J. N. MacCormack, Head
Communicable Disease Control Branch
Division of Health Services

Questions:

1. Does G.S. 130-90, after amendment of G.S. 130-87 by Chapter 191, 1971 Session Laws and by Chapter 160, 1977 Session Laws, require all children presently attending school in North Carolina to be immunized against red measles (rubeola) and rubella?

2. Are school authorities now prevented from excluding student from school in accordance with G.S. 130-90 for not obtaining the immunizations required by G.S. 130-87 (at the time such students were first enrolled in school in North Carolina) when such students have been allowed to continue in school after expiration of the thirty (30) day grace period during which evidence that the child had received the required immunizations should have been presented to school authorities?

Conclusion:

1. All children presently attending school in North Carolina are not required to be immunized against red measles (rubeola) and rubella as a requirement for continuance in school. All children enrolled in school for the first time in North Carolina after April 13, 1971 are required to be immunized against red measles (rubeola) as well as the other previously required immunizations and all children enrolled in school for the first time in North Carolina after July 1, 1977 must also be immunized against rubella as a requirement for continuance in school.

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2. Under G.S. 130-90, school authorities are able to exclude students from school who have not received the immunizations required by G.S. 130-87 (at the time such students were first enrolled in school in North Carolina) even though such students were allowed to continue in school after expiration of the thirty (30) day grace period, set forth in G.S. 130-90.

As to the first question presented, the conclusion reached is based on the same reasoning and in accordance with the Opinion of the Attorney General to Dr. J. N. MacCormack concerning rubella immunization dated November 29, 1977 and reported at 47 NCAG 130.

As to the second question presented, are school authorities prevented by the doctrine of estoppel from enforcing G.S. 130-90?

Generally, laches and estoppel may not be relied upon to deprive the public of protection of a statute because of mistaken action or lack of action on the part of public officials. *McComb v. Homeowners' Handicraft Coop.*, 176 F. 2d 633, cert. denied, 70 S. Ct. 250, 358 U.S. 900, 94 LEd. 553 (N.C. App. 1949); *accord, S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971). However, the doctrine of estoppel *may* be applied cautiously because of the public interest involved. *See, Goldhlath v. Chicago*, 39 Ill. App. 2d 211, 174 N.E. 2d 222 (1961); *accord, Lanier v. Williams*, 361 F. Supp. 944 (D.C.N.C. 1973).

The purpose of G.S. 130-90 is to protect the public health by conditioning a child's *continuance* in school on his obtaining the immunizations required by G.S. 130-87. It is stated in 39 Am Jur 2d, Health, Section 1, that:

> "The preservation of the public health is one of the duties devolving on the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important, and an imperative obligation rests on the State, through its proper instrumentalities or agencies, to take all necessary steps to promote this object."

If suitable information is given to parents of unimmunized children concerning the required immunizations and if an adequate time for compliance is provided; it would seem that the exclusion of such children from school would not result in manifest injustice as long as any constitutional requirements of due process are met concerning such explusion, especially in light of the public interest involved.

For the above reasons, it is our opinion that G.S. 130-90 would require a child to only receive the immunizations required by G.S. 130-87 when he was first enrolled in school either as a result of his attaining the age required by G.S. 115-162 or G.S. 115-205.12 or as the result of his parents or guardian becoming residents of this State and that the duty of school authorities to exclude children who do not receive such immunizations arises thirty (30) days after their admittance to school and is enforceable at any time thereafter.

Rufus L. Edmisten, Attorney General
Jan Napowsa
Associate Attorney

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20 October 1978

Subject: Infants and Incompetents; Day-Care Licensing; Construction of Criminal Statutes

Requested by: Senator Harold W. Hardison
North Carolina General Assembly

Questions: (1) Should children who receive care in a child-care arrangement for less than four hours per day be counted in determining whether the arrangement must be licensed as a day-care facility?

(2) Do children in the care of great-aunts or other relatives come within the exclusion to the definition of "day-care"

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set out in G.S. 110-86(2) so that such children would not be counted in determining whether a child-care arrangement was caring for more than five children?

Conclusions:

(1) Children who receive care in a child-care arrangement for less than four hours per day should not be counted in determining whether the arrangement must be licensed as a day-care facility.

(2) The exclusion from the definition of "Day care" set out in G.S. 110-86(2) is limited to children who are cared for by their parents, grandparents, guardians or full-time custodians; therefore, children in the care of great-aunts or other relatives who are not their parents, grandparents, guardians or full-time custodians must be counted in determining how many children are receiving day care.

G.S. 110-98 provides that it shall be unlawful to operate a day-care facility without being licensed under the provisions of Article 7 of Chapter 110 of the General Statutes. G.S. 110-103 provides that a violation of the provisions of G.S. 110-98 through 110-102 is a general misdemeanor, which is punishable by imprisonment for a term not exceeding two years or by a fine or by both, in the discretion of the court. (G.S. 14-3). In requiring that day-care facilities be licensed, the legislature stated its purpose in G.S. 110-85:

> The General Assembly hereby declares its intent with respect to day care of children:
>
> (1) The State should protect the growing number of children who are placed in day-care facilities or in child-care arrangements when these children are under the supervision and in the care of persons other than their parents,

grandparents, guardians or full-time custodians during the day.

(2) This protection should assure that such children are cared for by persons of good moral character, that their physical safety and moral environment are protected, and that the day-care resources conform to minimum standards relating to the health and safety of the children receiving day care.

(3) This protection requires the following elements for a comprehensive approach: mandatory licensing of day-care facilities under minimum standards; promotion of higher levels of day care than required for a license through the development of higher standards which operators may comply with on a voluntary basis; registration of day-care plans which are too small to be regulated through licensing; and a program of education to help operators improve their programs and to develop public understanding of day-care needs and problems."

Article 7 of Chapter 110 makes a distinction between two types of child-care arrangements providing day care: day-care plans and day-care facilities. Only facilities are required to be licensed. A day-care facility is defined as "any day-care center or child-care arrangement which provides day care on a regular basis for more than four hours per day for more than five children, wherever operated and whether or not operated for profit...." A day-care plan is defined as "any day-care program or child-care arrangement where any person provides day care for more than one child and less than six children, wherever operated and whether or not operated for profit."

It is common for both day-care plans and day-care facilities to provide care for after-school children and other children who are generally present for less than four hours per day. Because of the clearly stated legislative intent to protect children who receive care away from their homes, it is tempting to include these after-school

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children in the number of children used to determine whether or not a child-care arrangement is a day-care facility which must be licensed in order to operate or a day-care plan which must be registered in order to operate. In 1975, at 44 N.C.A.G. 234, this Office dealt with the question of the maximum number of children for whom care could be provided in a day-care plan, and concluded that the maximum number, including after-school children, was five. However, since a violation of the day-care licensing requirements is a criminal offense, and since criminal provisions must be strictly construed, with all conflicts or ambiguities resolved in favor of the defendant, the definition of a day-care facility must be interpreted so as to exclude any after-school children or other children who receive care for less than four hours per day when determining whether more than five children are receiving care.

Thus, if a child-care arrangement provides care on a regular basis for five children under 13 years of age for more than four hours per day (excluding children, grandchildren, wards, or children in full-time custody) and for any number of children for less than four hours per day, that arrangement would be considered a day-care plan which would not be required to obtain a license to operate. Any previous interpretations which conflict with this Opinion are hereby overruled to the extent of the conflict.

G.S. 110-86(2) defines "Day-care" to include "any child-care arrangement under which a child less than 13 years of age receives care away from his own home by persons other than his parents, grandparents, guardians or full-time custodians."

The exclusion as to parents, grandparents, guardians and full-time custodians is very specific and unambiguous. In light of the clearly stated purpose of the day-care licensing laws, there is no basis for expanding the exclusion to include any other relatives who are not guardians or full-time custodians.

Rufus L. Edmisten, Attorney General
Ann Reed
Special Deputy Attorney General

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20 October 1978

Subject: Mental Health; Involuntary Commitment; Transfer of a Respondent to a Private Hospital

Requested by: Honorable James E. Lanning
District Court Judge
26th Judicial District

Question: In a situation wherein a District Court Judge has involuntarily committed a respondent to a State Hospital under the provisions of Article 5A, Chapter 122, is it necessary to obtain an additional order from the Court in order to permit later transfer of the respondent to a private hospital?

Conclusion: No, the respondent may be transferred by order of the Department of Human Resources pursuant to G.S. 122-80.

G.S. 122-58.8 provides that, upon determination that involuntary commitment is warranted, the District Court may "...order treatment, inpatient or outpatient, for a period not in excess of 90 days, at a mental health facility, public or private, designated or licensed by the Department of Human Resources." Thus, in the initial order, commitment to a private hospital (if the respondent, his family, or representatives are amendable to bearing the cost of hospitalization) may be made if the Judge, in his discretion, feels such is appropriate.

After the original commitment, the provisions of G.S. 122-80, as follows, would appear to apply:

> "Patients transferred from State hospital to private hospital--When it is deemed desirable that any patient of any State hospital be transferred to any licensed private hospital within the State, the Department of Human Resources may so order. A certified copy of

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the hospitalization order on file at the State hospital shall be sent to the private hospital which, together with the order of the Department of Human Resources, shall be sufficient warrant for holding the mentally ill or mentally retarded person, or inebriate by the officers of the private hospital. A certified copy of the order of transfer shall be filed with the clerk of superior court of the county from which such mentally ill or mentally retarded person, or inebriate was hospitalized. After such transfer the State hospital from which such patient was transferred shall be relieved of all future responsibility for the care and treatment of such patient."

Literal reading of this statute compels the conclusion that it was not the intent of the General Assembly to require that an additional court order be obtained in order to effect the transfer described in the question. To the contrary, the statute permits a determination of the appropriateness of the transfer to be made by the Department of Human Resources. Like other functions of that Department, the authority to take this action may be delegated to a subordinate agency of such Department. Of course, this action can only be taken if the patient, his family, or representatives are willing to pay the costs of the hospitalization and if the private hospital involved is capable and willing to accept the respondent.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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26 October 1978

Subject: Mental Health; Involuntary Commitments; Petitioner in Involuntary Commitment Proceedings Involving a Prisoner.

Requested by: Ms. Judith L. Kornegay,
Special Counsel
Dorothea Dix Hospital

Question: In a case involving a prisoner in a state correctional institution who becomes mentally ill and dangerous to himself or others, who is the person responsible for acting as petitioner for involuntary commitment of the prisoner to a treatment facility under Article 5A, Chapter 122?

Conclusion: A staff psychiatrist of the correctional institution must be the petitioner.

For ordinary situations, the initiation of involuntary commitment proceedings to treatment facilities is dealt with by G.S. 122-58.3. Subsection (a) of that statute provides that any person having adequate knowledge may execute the requisite affidavit and petition necessary for the institution of involuntary commitment proceedings. Apparently some discussion has been encountered as to the applicability of this statute to a prisoner in a correctional institution.

G.S. 122-85 addresses the subject of commitment of prisoners directly and serves to resolve the issue with the following language:

> "(a) A convict who becomes mentally ill and imminently dangerous to himself or others after commitment to any penal institution in the State shall be processed in accordance with Article 5A of this Chapter, *as modified by this Section, except when the provisions of Article 5A are manifestly inappropriate. A staff psychiatrist of the prison shall execute the affidavit required by G.S. 122-58.3*, and send it to the Clerk of Superior Court of the county in which the penal facility is located." (Emphasis supplied)

The specific language of the second sentence of G.S. 122-85 (a)–particularly when coupled with the emphasized words in the first sentence–clearly identifies the intent of the General Assembly relative to the involuntary commitment to treatment facilities of prisoners in correctional institutions. As a result of this language, only a staff psychiatrist of such institution is authorized to execute the requisite affidavit and accompanying petition.

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The rationale behind this statute is readily apparent after consideration of the nature and location of such type of respondent. This distinction as to the manner of initiation of these proceedings presents no problems under the equal protection clause of the Constitution; further, the statute fully grants a prisoner the due process protection in all succeeding proceedings vital to deprivation of any of his rights.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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27 October 1978

Subject: Register of Deeds; Mortgages and Deeds of Trust - Cancellation

Requested by: Howard P. Neumann
Assistant County Attorney
Washington County

Questions: (1) The beneficiary of a deed of trust marks both the note and deed of trust as satisfied and paid in full. Upon presenting these to the Register of Deeds, is the beneficiary entitled to have the deed of trust cancelled of record?

(2) A note and deed of trust are given to secure an obligation. The payee on the note and the beneficiary of the deed of trust are the same party. The payee endorses the note to a third party but no physical assignment of the deed of trust is made. The third party marks the note satisfied and paid in full, and the beneficiary marks the deed of trust satisfied and paid in full. May the Register of Deeds cancel the deed of Trust of record?

Conclusions: (1) No.

(2) No.

The discharge of record of mortgages, deeds of trust and other instruments is governed by G.S. 45-37. That statute sets out several methods of discharge. However, there must be strict compliance with the statute, regardless of the particular method chosen. *Mills v. Kemp*, 196 N.C. 309, 145 S.E. 557 (1928).

Cancellation under the facts presented is governed by G.S. 45-37(2). The deed of trust, mortgage or other instrument along with the bond, note or other instrument thereby secured must be exhibited to the Register of Deeds, with the endorsement of payment and satisfaction by

(a) The obligee
(b) The mortgagee
(c) The trustee
(d) An assignee of the obligee, mortgagee, or trustee or
(e) Any chartered banking institution, national or state, or credit union, qualified to do business in and having an office in the State of North Carolina, where so endorsed in the name of the institution by an officer thereof.

Cancellation is not authorized by anyone other than those parties listed in the statute. *Faircloth v. Johnson*, 189 N.C. 429, 127 S.E. 346 (1925). Thus the underlying question must be whether a beneficiary of a deed of trust is one of the parties listed in the statute - either expressly or by construction.

"In construing a statute it will be presumed that the legislature comprehended the import of the words employed by it to express its intent. Accordingly, technical terms must ordinarily be given their technical connotation." 12 Strong's N.C. Index 3rd, *Statutes* 5.11 (1978).

At the outset, there is no indication in the question that the beneficiary of the deed of trust is a bank or an assignee of the obligee, mortgagee or trustee.

The term "obligee" refers to a person in favor of whom some obligation is contracted, but when used in its technical sense includes only payees of notes, bonds, etc., and not to mortgage parties. BLACK'S LAW DICT. 1226 (Rev. 4th ed. 1968).

Technically the beneficiary in a deed of trust is also not a mortgagee, but a cestui que trust. Osborne, *Mortgages*, §17(2nd ed. 1970).

There are three parties to a deed of trust - the grantor or trustor, the trustee and the cestui que trust (beneficiary). There are only two parties to a mortgage, the mortgagor and the mortgagee.

The Courts clearly recognize a difference between the true mortgage and a deed of trust as evidenced by the following statement,

> Upon the execution of a mortgage or deed of trust on real estate, legal title to the land vests in the mortgagee *or* trustee, as the case may be. *Simms v. Hawkins*, 1 N.C. App. 168, 160 S.E.2d 514 (1968). (Emphasis added).

Unlike the trustee or mortgagee, the beneficiary does not hold legal title. Webster, *Real Estate Law In North Carolina*, §228-230 (1970). Thus, the beneficiary in a deed of trust is not synonymous with a mortgagee.

Finally, although it is theoretically possible for the beneficiary and trustee to be the same person, there is no indication of that here and, indeed, it would be highly unlikely in the typical deed of trust case.

In the opinion of this Office there is no authority for cancellation of record of the deed of trust upon endorsement of satisfaction by the beneficiary thereof. *See, also, Mills v. Kemp, supra.*

Regarding the second question, although the payee (obligee) is a proper party to cancellation under G.S. 45-37(2), his endorsement appears only on the note. It has already been established that the beneficiary's endorsement in the deed of trust is insufficient. The question then becomes whether *both* the note and the deed of trust must be marked satisfied by the proper party?

It would appear that the Legislature intended an answer in the affirmative when one considers the following exception in the statute providing.

> The exhibition of the mortgage, deed of trust or other instrument alone to the Register of deeds with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured...and does not call for or recite any note, bond or other instrument secured by it. G.S. 45-37(2).

Also see Webster, *Real Estate Law In North Carolina*, §225 at p. 316 (1971).

Rufus L. Edmisten, Attorney General
Lucien Capone, III
Associate Attorney General

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1 November 1978

Subject: Mental Health; Involuntary Commitment; Criminal Law; Preliminary Evaluation of Defendant Incapable of Proceeding With Trial.

Requested by: Dr. William Thomas
Chief of Adult Services
Division of Mental Health and Mental Retardation Services

Question: When a defendant is found incapable of proceeding with a criminal trial and the trial court takes the action directed by G.S. 15A-1003 (a), is the examination by a qualified physician as described in G.S. 122-58.4 required?

Conclusion: Yes.

In a situation involving a defendant in a criminal action who is found to lack the mental capacity to proceed with trial, G.S. 15A-1003(a) provides as follows:

> "If a defendant is found to be incapable of proceeding, the Court must enter an order directing the initiation of proceedings for involuntary civil commitment, and the Court's order is authority for a magistrate or clerk to order a law-enforcement officer to take the defendant into custody for examination by a qualified physician under G.S. 122-58.3(b), or for processing as an emergency case under G.S. 122-58.18."

In turn, G.S. 122-58.3(b) requires the magistrate or clerk to "...issue an order to a law-enforcement officer to take the respondent into custody for examination by a qualified physician."

Apparently some disagreement has developed as to whether the law-enforcement officer, when confronted with this type of respondent, is required to take him to one of the facilities described in G.S. 122-58.4. Reportedly, in some instances, arguments have been advanced that the respondent is to be taken directly to a regional hospital.

The language of the governing statutes makes it clear that it was the intent of the General Assembly to afford this type of respondent the same due process as that available to others. One step of that due process is the preliminary evaluation by a local qualified physician as required by G.S. 122-58.4. Only upon a determination by that physician that the defendant/respondent meets the standards for involuntary commitment is he to be disposed of in accordance with G.S. 122-58.4(c) and G.S. 122-58.6(a).

Of course, as permitted by G.S. 15A-1003(a), situations falling within the purview of G.S. 122-58.18 should be handled in accordance with that statute. Further, all personnel responsible for the processing of defendants/respondents should be aware that G.S. 15A-1004 quite logically makes specific provisions regarding the monitoring, reporting, etc. of individuals of this type.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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1 November 1978

Subject: Taxation; Ad Valorem Taxes; Mobile Homes; Tax Permits; Seller of Used Mobile Homes as "Retailer"; G.S. 105-316.1

Requested by: Leon M. Killian, III
Haywood County Attorney

Question: (1) Is an individual engaged in the business of buying and selling only used mobile homes a "retailer?

(2) Is he required to obtain a tax permit before moving a mobile home into his inventory, or before moving a mobile home to the premises of a purchaser?

Conclusion: (1) Yes

(2) No

An individual is engaged in the business of buying and selling used (and only used) mobile homes. Presumably he buys them from mobile home wholesalers or from individuals who first bought them at retail; and presumably he sells them at retail and not to others for resale. He is neither a lien holder nor a manufacturer.

G.S. 105-316.1(a) requires that a "tax permit" be obtained before a mobile home may be moved by anyone other than a manufacturer or retailer. G.S. 105-316.1(b) specifically provides that "manufacturer, retailers and licensed carriers of mobile homes "shall not be required to obtain such permits. The purpose of the permit is to prevent the avoidance or evasion of tax on highly mobile

property, since to obtain the permit requires payment of the tax, and failure to obtain it is a misdemeanor. G.S. 105-316.2,.3,.6.

Heretofore, the businessman has been required by the tax collector to pay taxes and obtain permits before moving the units which are his stock in trade. It is not clear whether he has been required to get the permits when he acquires a unit for resale and moves it to his lot, or when he sells to a consumer and moves it from his lot, or both. However, we believe that under G.S. 105-316.4, neither is correct if he is a "retailer".

"Retailer" is not defined in the Machinery Act, and has not been judicially construed in the context of G.S. 105-316.1. However, it is defined in the Sales and Use Tax Act as "every person engaged in the business of making sales of tangible personal property at retail". G.S. 105-164.3(14) "Retail" means "the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale." G.S. 105-164.3(13). While there is no necessary transfer of meaning between the two Acts, we think that the Sales Tax definition catches the accepted sense of the word in that it is a sale to one for use or consumption and not for resale as part of a retail business. Thus, it is our opinion that the businessman in question is a "retailer" of used mobile homes and is not required to obtain a permit or pay delinquent taxes on a used mobile home when he moves it from the seller's premises to his lot, or from his lot to the purchaser's premises, under the provisions of G.S. 105-316.1(a) and (b). It appears to us that any other result would require amendment of the pertinent statutes.

If the tax collector if aware of the sale by the owner to the retailer, he might want to consider garnishment upon the retailer before the purchase price is paid to the owner. G.S. 105-368. Unfortunately, it is likely that he seldom if ever knows of the sale until after the fact.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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8 November 1978

Subject: Taxation, Income Tax; Excise and Capital Stock Tax on Savings and Loan Associations; Federal Stock Savings and Loan Associations; G.S. 54-1(b); G.S. 54A-1 et seq.; G.S. 105-130 et seq.; G.S. 105-228.22

Requested by: W. L. Cole, Administrator
Savings and Loan Division
North Carolina Department of Commerce

Question: Are federally-chartered stock savings and loan associations subject to tax like mutual savings and loan associations, or like business corporations generally?

Conclusion: Federally-chartered savings and loan associations are subject to tax like mutual savings and loan associations

In a letter from W. L. Cole, Administrator, Savings and Loan Division, North Carolina Department of Commerce, the following facts are given:

1. "Pursuant to Federal law, Federal mutual associations may apply to the Federal Home Loan Bank Board for permission to convert into Federal stock associations; however, there is a current moratorium on such conversions."

2. "At present, Federal mutual associations are taxed like State mutual associations under Article 8D of Chapter 105 of the General Statutes. Under Article 8D such associations pay a capital stock tax and an excise tax. However, questions have arisen regarding the taxation of Federal mutual associations which convert to Federal stock associations."

Mr. Cole has asked "would such Federal stock associations be taxed under Article 8D or would such associations be taxed in the same

manner as general business corporations organized under the provisions of Chapter 55 of the General Statutes?"

Subchapter I of Chapter 54 of the General Statutes relates to savings and loan associations generally, which are created pursuant to the laws of this State. Chapter 54A relates specifically to stock-owned as opposed to mutual, savings and loan associations created pursuant to State law, and G.S. 54-1(b) specifically requires such associations created under Chapter 54A to "be taxed as a business corporation organized under the provisions of Chapter 55", which is the "Business Corporation Act". The income of such corporations is taxed under the Corporation Income Tax Act, G.S. 105-130 et seq.

Other savings and loan associations are taxed pursuant to Article 8D, Subchapter I of Chapter 105 of the General Statutes, and in that connection, G.S. 105-228.22 provides:

> "The provisions of this Article shall apply to every building and loan association or savings and loan association organized under the laws of this State or organized under the laws of another state and which maintains one or more places of business in this State and to every savings and loan association organized and existing under the 'Home Owners Act of 1933' and which maintains one or more places of business in this State, all such associations hereinafter to be referred to as Building and Loan Association."

Article 8D then proceeds to levy a capital stock tax and an excise tax upon such associations.

Federal savings and loan associations are created pursuant to the provisions of the "Home Owners Loan Act of 1933", 12 USC §1461 et seq. Since the Corporation Income Tax Act affects only those associations organized pursuant to Chapter 54A, and since federal associations are not organized pursuant to that Act but pursuant to federal law, the corporation income tax does not apply to them. However, since G.S. 105-228.22 specifically applies to "every savings and loan association organized and existing under the 'Home Owners Loan Act of 1933' and which maintains one or more places of business in this State", we conclude that the taxes imposed by

Article 8D apply to all such associations created purusant to federal law, both mutual and stock.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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10 November 1978

Subject: Motor Vehicles; Drivers' Licenses; Financial Responsibility Act of 1953; Unsatisfied Judgments Property Damage Judgment by Owner or Bailee against Negligent Driver of the Owner's or Bailee's Motor Vehicle

Requested by: Mr. Joe Register, Director
Traffic Records
Division of Motor Vehicles

Question: Are the mandatory provisions of G.S. 20-279.13(a) applicable to an unsatisfied judgment obtained by an owner or bailee against a negligent driver of the owner's or bailee's motor vehicle for the diminished value of such motor vehicle?

Conclusion: No.

An owner or bailee of a motor vehicle obtained a default judgment against a negligent driver of the owner's or bailee's motor vehicle and her master or employer for the diminished value of such motor vehicle resulting from a collision with a third party. A motor vehicle liability insurance policy was in effect. The judgment creditor has demanded the Division of Motor Vehicles to suspend the motor vehicle operator's licenses of the judgment debtors under the provisions of G.S. 20-279.13(a).

G.S. 20-279.21(a) provides in pertinent part:

"(a) A 'motor vehicle liability policy' as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance, ..."

G.S. 20-279.21 (b) provides in pertinent part:

"(b) Such owner's policy of liability insurance:

. . .

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles...as follows:...five thousand dollars ($5,000) because of injury to or destruction of *property of others* in any one accident;" (Emphasis added).

G.S. 20-279.21(e) provides in pertinent part:

"(e) Such motor vehicle liability policy need not insure against loss from...any liability for damage to property owned by, rented to, in charge of or transported by the insured."

Under G.S. 20-279.21(c) an operator's policy of liability insuranc is subject to the same limits of liability. G.S. 20-279.21(d) require all motor vehicle liability policies to be subject to the provision of Article 9A. G.S. 20-279.21(g) provides for excess and addition coverage, but "the term 'motor vehicle liability policy' shall appl only to that part of the coverage which is required by this section.

From the foregoing statutory provisions, it is clear that a "moto vehicle liability policy" requires property damage coverage for th benefit of third party beneficiaries and not collision or upse insurance coverage for the benefit of the insured. Although th judgment in question appears to fall within the definition o

judgment as defined in G.S. 20-279.1(3) and subject to the provisions of G.S. 20-279.13, when these statutes are construed in *pari materia* with the other provisions of Article 9A and Article 13, Chapter 20, of the General Statutes, it appears that such was not the intent of the General Assembly. The legislative intent is revealed not only by the provisions of G.S. 20-279.21 in defining and setting forth the requirements of the motor vehicle liability policy but in other statutory provisions.

G.S. 20-279.1(11) provides in pertinent part:

> "(11) 'Proof of financial responsibility': Proof of ability to respond in damages for liability, on account of accidents...arising out of the ownership, maintenance or use of a motor vehicle, ...in the amount of five thousand dollars ($5,000) because of injury to or destruction of *property of others* in any one accident. *Nothing contained herein shall prevent an insurer and an insured from entering into a contract, not affecting third parties, providing for a deductible as to property damage at a rate approved by the Commissioner of Insurance.*" (Emphasis added).

The requirements as to security and suspension under the provisions of G.S. 20-279.5 do not apply to the operator or owner if an owner's or operator's motor vehicle liability policy was in effect or wherein no injury or damage was caused to the person or property of anyone other than such operator or owner. G.S. 20-279.5(c)(1); G.S. 20-279.6(1).

Although not involving a judgment for damages to the insured's property, in *Moore v. Young*, 263 N.C. 483, 139 S.E. 2d 704 (1965), the Court stated:

> "The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry liability insurance, not accident insurance to indemnify all persons who might be insured's car." Accord: *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585 (1973); See also *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d. 313 (1968).

In *Commonwealth of Kentucky, Dept. of Public Safety v. Robinson*, 435 S.W. 2d 447 (Ky., 1968), the defendant, Robinson, owned two trucks used for hauling gravel. While being operated by his employees, the brakes on one truck failed causing it to run into the other truck, forcing it off the road and over a bluff killing the operator thereof. A judgment was obtained against Robinson and the other truck driver. The Department of Public Safety was permanently enjoined from canceling or suspending or refusing to renew the motor vehicle operator's license or motor vehicle registration of Robinson. A Kentucky financial responsibility statute, similar to G.S. 20-279.21(e), KRS 187.490(5) provided:

> "(5) The motor vehicle liability policy shall not insure any liability under any workmen's compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured."

In affirming the lower court decision, the Court of Appeals of Kentucky stated:

> "The General Assembly set forth the minimum standards of the 'motor vehicle liability policy' required. The parties agreed that appellee had complied in full with the requirements of The Financial Responsibility Law. KRS, Chapter 187. Again, in its wisdom had it seen fit, the General Assembly need not have provided the exclusion in KRS 137.490(5), which in this case resulted in appellee's being uninsured. The remedy for such lack of coverage addresses itself to the General Assembly. Inasmuch as appellee had complied with the standards required, it was unlawful and unreasonable to revoke or suspend his license or registrations."

Since there was a motor vehicle liability insurance policy in effect meeting statutory requirements, the operator's license of the driver

and her master or employer should not be suspended under the provisions of G.S. 20-279.13(a).

Rufus L. Edmisten, Attorney General
William B. Ray
Assistant Attorney General

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14 November 1978

Subject: Public Records; North Carolina Uniform Traffic Ticket and Complaint; Right of Public Inspection

Requested by: Barbara Smith
Assistant Secretary
Department of Crime Control and Public Safety

Questions:

1. Is the Departmental Copy of the North Carolina Uniform Traffic Ticket and Complaint, which is submitted by a Highway Patrolman to the District First Sergeant who transmits it to the Traffic Record Section of the Division of Motor Vehicles, a public record and subject to inspection during the time it is maintained at the Patrol District Headquarters?

2. Is the Enforcement Division Copy of the North Carolina Uniform Traffic Ticket and Complaint, which is maintained by the officer issuing the complaint and includes his notes and other evidence, a public record and subject to inspection prior to trial of the offense charged in the complaint?

3. Is the Enforcement Division Copy of the North Carolina Uniform Traffic Ticket

and Complaint a public record and subject to inspection in the Patrol District Headquarters after the trial of the offense charged in the complaint?

Conclusions: 1. No.

2. No.

3. No.

The General Assembly has defined the term public records to mean:

> "'Public record' or 'public records' shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, ... or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina Government or its subdivisions." G.S. 132-1.

A custodian of a public record is the "public official in charge of an office having public reocrds". G.S. 132-2. "Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law." G.S. 132-6.

The North Carolina Uniform Traffic Ticket and Complaint is authorized pursuant to G.S. 7A-148(b) and G.S. 15A-302. There is no statutory requirement for disposition of copies of the uniform complaint except that a copy of the complaint must be delivered to the person cited. G.S. 15A-302(d).

The initial question is whether the District First Sergeant is required to allow inspection of the Departmental Copy of the North Carolina Uniform Traffic Ticket and Complaint during the time that he has the copy and before he transmits it to the Traffic Records Section of the Division of Motor Vehicles. This copy of the complaint contains the same information as the original and the copy filed

in the clerk's office. The First Sergeant is just a conduit for this copy of the complaint. The General Assembly could not have intended that each person who receives public record and passes it on would be required to allow that public record to be inspected during the time, however short, that the individual has possession of the record. Only a person "having custody of public records" is required to permit inspection. G.S. 132-6. A custodian is the "public official in charge of an office having public records." G.S. 132-2. It does not seem that the General Assembly intended that the District First Sergeant be a custodian within the meaning of the statute. He does not file or maintain a log of the records temporarily in his possession other than the report he prepares.

In addition, a custodian must "furnish certified copies" of the public records upon payments of fees prescribed by law. There is no authority, that we can ascertain, for a Sergeant in the Highway Patrol to certify copies of complaints. The clerk of court may certify copies of complaints on file with him. G.S. 7A-103(6). The Commissioner of Motor Vehicles is also authorized to certify copies of records on file in his office. G.S. 20-42(b). In the situation described, the District First Sergeant is not a custodian of public records and therefore is not required to permit them to be inspected and examined and is not required to furnish certified copies of them. This information or record can be obtained from the clerk of court or the Commission of Motor Vehicles. The Highway Patrol does not have the personnel necessary to allow such inspection in all 49 districts.

The second question presented is whether the Enforcement Division Copy of the North Carolina Uniform Traffic Ticket and Complaint which is maintained by the arresting officer and contains his notes and other evidence is a public record and subject to inspection and examination. It has been consistently held that there is no common law right to discovery in a criminal case. *State v. Goldburg*, 261 NC 181, 134 SE 2d 334, cert. den. 377 US 978 (1964). Even though a law enforcement officer makes his notes and gathers evidence pursuant to the authority granted him by law, i.e. G.S. 20-188, if such records and notes are not required to be disclosed to a criminal defendant, we fail to see how the same notes are required to be disclosed to the general public. A criminal defendant can only obtain those items which are allowed by the criminal discovery statutes.

See *State v. Davis*, 282 NC 107, 191 SE 2d 664 (1972); *State v. Blue*, 20 NC App. 386, 389, 201 SE 2d 548 (1974) (notes of officer not subject to discovery); *State v. Jones*, 23 NC App. 686, 688, 204 NC 508 (1974), cert. den. 286 NC 418 (reports of officers or work product of police not subject to disclosure in this case).

Despite the broad language of the Public Records Act, supra, the courts have held certain records as confidential. G.S. 148-74 and 148-76 require that records be maintained on prisoners. They are not specifically declared to be confidential. However, the Supreme Court held that a prisoner, who is an interested party, may not see such files. *Goble v. Bound*, 13 NC App. 579, 581, aff.'d 281 NC 307, 188 SE 2d 347 (1972).

The notes, opinions, and preceptions of the law enforcement officer may be contained on his copy of the Uniform Traffic Ticket and Complaint. Based upon the above case law, the opinion of this Office issued on June 3, 1975, to the Honorable J. Herbert Haynes, Sheriff of McDowell County, 44 NCAG 340 (1975), is still valid. This opinion concluded that investigative reports and memoranda concerning investigations of crimes are not public records within this sense of Chapter 132 and are therefore not subject to public inspection. This opinion and the reasoning supporting it would apply to the Enforcement Division Copy of the North Carolina Uniform Traffic Ticket and Complaint.

Florida has a similar statute to North Carolina. Chapter 119.01 of the Florida statute provides that "(i)t is the policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person." A public record is defined to mean "...all documents, papers, letters, maps, books, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of official business by any agency." Chapter 119.011(1), Florida Statutes. This language is almost identical to the North Carolina statute. The Florida Courts have construed this statute to exempt police records.

> "First, it is clear that police reports are not public records within the meaning of Section 119.01, Florida Statutes (1975) and thus need not be held open at

> all times for personal inspection by any person. Police records are ordinarily confidential." *City of Tampa v. Harold*, 352 So. 2d 944, 946 (Fla. App., 1977).

The Florida Supreme Court held that police records could be produced and used in evidence in a trial only in a rather restrictive sense and outline that criteria governing production and use.

> "It depends, as we have said, upon 1) being critical, 2) upon a material and vital point, 3) reasonably exculpatory of defendant within sound judicial discretion, and 4) after 'in camera' review and deletion of improper matter." *State v. Johnson*, 284 So. 2d 198 (Fla. 1973)

Florida has recognized the need, as our previous opinion did, for police records to be held confidential. The items in question here are just as much police record as any other form. They must therefore be deemed confidential and not subject to inspection absent an order from a court of competent jurisdiction.

After the trial of the matter charged by the Uniform Traffic Ticket and Complaint, the notes and evidence gathered by the officer would still prevent this item from being a public record. The officer would be less likely to put down the necessary information to assure proper prosecution of the criminal matter if he knew that such notes and impressions would be subject to inspection and publication. Revealing such records would have a chilling effect upon a law enforcement officer and no appreciable public benefit. The impressions and notes which are introduced at the trial as evidence become part of the record of the trial and may be inspected in the courthouse. All other matters which were not introduced at the trial should not be required to be disclosed. The same rationale for not disclosing the notes of the law enforcement officer before trial would seem also to apply after trial.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Assistant Attorney General

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14 November 1978

Subject: Public Officers; Conflict of Interest; Public Officer Contracting with Corporation in Which He is a Stockholder or Officer.

Requested by: John F. Kime
Town Manager
Liberty N. C.

Question: Does a conflict of interest, prohibited by G.S. 14-234, exist if a member of the City Council is a minority stockholder or an officer of public or private corporation and the City Council enters into a contract with that corporation?

Conclusion: Yes. The general rule is that a public officer who is either a stockholder or officer of a corporation which enters into a contractual relation with the officer or the public body of which he is a member, violates a statute which prohibits such public officer from having a direct or indirect interest in any such contract, and is also against public policy as declared by the common law.

Many cases are cited in 140 C.L.R. 344 to support the above general rule. The North Carolina Supreme Court has held that the prohibition of G.S. 14-234 extends to an *officer* of a corporation in making contracts between the corporation and the city or county governing body of which he is a member. *State v. Williams*, 153 NC 595; *Lexington Insulation Co. v. Davidson County*, 243 NC 252.

"No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of criminal misconduct and which is in direct contravention of the public policy of the State. *Fashion Co. v. Grant*, 165 NC 453, 81 S.E. 606; *Marshall v. Dicks*, 175 NC 38, 94 S.E. 514; *Lamm v. Crumpler*, 233 NC 717, 65 S.E. 2d 336; *Waggoner v. Publishing Co.*, 190 NC 829, 130 S.E. 609.

"Public Office is a public trust and this Court will not countenance the subversion thereof for private gain. Not only will it declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, of a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a *quantum meruit* basis. In entering into such contract, a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty. He may look in vain to the courts to aid him in his efforts to recoup his losses, due to the invalidity of the contract, on the grounds the public agency which he serves has been enriched by his misconduct.

"In other words, this Court will not recognize or permit any recovery bottomed on the criminal conduct of a public official. To put it simply, the doors of the courts are closed to any individual, or firm in which he is financially interested, who engages in a transaction which comes within the language of the statute. *Snipes v. Winston*, supra; *Davidson v. Guilford*, supra; *King v. Guilford*, 152 NC 438; *S. v. Williams,* supra, Annos. 84 A.L.R. 969, 110 A.L.R. 164, 154 A.L.R. 375; 12 A.J. 498." *Insulation Co. v. Davidson County*, supra, at. p. 255.

Although we find no North Carolina cases involving a public official who was a mere stockholder in the corporation, the courts in many other jurisdictions apply the general rule stated above. Most of the statutes involved contained language similar to G.S. 14-234, "be in any manner interested", "make any contract for his own benefit", "be in any manner concerned or interested in making such contract..., "either privately or openly, singly or jointly with another".

In *Hardy v. Mayor of Gainsville*, 48 SE 921, the statute contained the language "or have any interest in such contract either by himself or by another, directly or indirectly". The Council member held stock in a corporation which entered into a contract with the city. HELD: a stockholder in a private corporation clearly has an interest in the contracts of the corporation and the contract with the city was illegal and void.

There are many cases collected in 140 A.L.R. 344 which apply the

general rule stated above. The amount of stock held appears to be immaterial since even one share of stock constitutes the "interest" which brings the person within the prohibition of the law.

Apparently the cases do not draw a line between stock held in either a private or public corporation. The amount of stock held, or whether there was any actual knowledge of or participation in the contract between the governing board and the corporation.

As stated in *State v. Williams*, supra, the application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity and to apply it to every case which justly falls within its principle.

In an opinion dated March 13, 1970, 40 N.C.A.G. 565, this Office held that a school board is prohibited from contracting with a wholly owned subsidiary company of a parent company in which a school board member has stock.

Any administrative official of a local unit of government, having knowledge that a board member has a prohibited interest in a corporation or business, who contracts with or purchases supplies from the firm or corporation may be in violation of G.S. 14-230, and in any event the contract would be void and the funds could be recovered as being an unlawful expenditure of public funds.

Rufus L. Emisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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15 November 1978

Subject: Public Records; Chemical Test Operator's Log; Breathalyzer Rights Form; Law Enforcement Officers' Affidavits; Alcohol Influence Report; Breathalyzer Operational Checklist; Right of Public Inspection

Requested by: Barbara Smith
Assistant Secretary
Department of Crime Control and Public Safety

Questions:

1. Is the Chemical Test Operator's Log (DHS-2069) a public record and subject to inspection while in the possession of the chemical test operator?

2. Is the Breathalyzer Operational Checklist (DHS-2012) which is completed and maintained by the breathalyzer operator a public record and subject to inspection?

3. Is the copy of Form HP-332 (Affidavit Form) maintained by the arresting officer which is completed when a person refuses to take a chemical test to determine alcoholic content of the blood, a public record and subject to inspection?

4. Is the copy of the HP-332A (rights of person requested to take chemical test to determine alcoholic content of blood under G.S. 20-161.(a)) which maintained by the arresting officer a public record and subject to inspection?

5. Is the copy of the Alcohol Influence Report (HP-327) which is maintained by the arresting officer and the copy maintained at troop headquarters a public record and subject to inspection?

Conclusions:

1. No.

2. No.

3. No.

4. No.

5. No.

The General Assembly has defined the term public records to mean "'public record' or 'public records' shall mean all documents, papers, letters, maps. ... or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina Government or its subdivisions.' G.S. 132-1.

A custodian of a public record is the "public official in charge of any office having public records." G.S. 132-2. "Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under the supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law." G.S. 132-6.

As we have previously noted, there is an exemption from the public records law for investigative reports and memoranda concerning investigations of crimes maintained by police agencies. Opinion of the Attorney General to the Honorable J. Herbert Haynes, Sheriff of McDowell County, 44 NCAG 340 (1975); Opinion of the Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, ____ NCAG ____ (October 17, 1978). If the records mentioned fall within the exemption for records of police agencies, then they will not be subject to inspection absent an order from a court of competent jurisdiction.

The Chemical Test Operator's Log contains information on criminal defendants who are requested to take a chemical test to determine alcoholic content of the blood. The Log contains the operator's name, the driver's license number, name, birth day and sex of the person arrested. The date and time of arrest, the time and results of chemical test, if an accident was involved, the type of accident and additional arrest information such as the arresting officer's name. The original of this Log is maintained by the chemical test operator. A single copy is made and sent to the Division of Health Services. The operator retains the original of the Log and uses this information to refresh his memory so that he may testify in court.

This information is evidence in a criminal trial. A criminal defendant can normally only obtain such evidence through discovery pursuant to Article 48 of Chapter 15A. This discovery is only available in superior court. G.S. 15A-904(e) would allow a criminal defendant in superior court to obtain this information. Without this statute, the defendant would have no right to find out this information. *State v. Goldburg*, 261 NC 181, 134 SE 2d 334, cert. den. 377 US 978 (1964). However, pursuant to G.S. 20-139.1(e), a defendant in a DUI case must be furnished a copy of the test results, nothing else. There would be no need for G.S. 20-139.1(e), if these records were public and subject to inspection. The General Assembly could not have intended that a defendant be required to discover test procedures or results pursuant to Article 48 of Chapter 15A or G.S. 20-139.1(e), while the general public had an unqualified right to such documents.

The Breathalyzer Operational Checklist is a form provided to operator's of breathalyzer machines to assure that the instrument test was performed in accordance with the regulations of the Commission for Health Services of the Department of Human Resources. A chemical test operator must be prepared to testify that he performed the test according to the methods approved by the Commission for Health Services. G.S. 20-139.1(b). The Breathalyzer Operational Checklist is optional and is completed by the breathalyzer operator. Only an original is made and it is maintained by the operator and used by him to testify in court. Again, this item is a memorandum or report made by a law enforcement officer and therefore only subject to disclosure to a criminal defendant pursuant to Chapter 15A. Since a criminal defendant cannot obtain it except in superior court, the Legislature could not have intended that this item be a public record and subject to disclosure pursuant to Chapter 132.

The third question presented is whether the HP-332, Affidavit certifying refusal to take the breathalyzer test, is a public record and subject to inspection in the hands of the arresting officer. G.S. 20-16.2(c) and (d) require that the arresting officer and the person authorized to administer a chemical test prepare a sworn report to the Division of Motor Vehicles before an individual's license can be revoked for willfully refusing to submit to a test to determine the blood alcohol concentration. The original of this

Affidavit is submitted to the Division of Motor Vehicles and a copy is maintained by the arresting officer. The arresting officer's copy would be considered his notes or report and therefore not subject to disclosure as is the case to items specified above.

The HP-332A sets forth the name of the person arrested, place arrested, time and date of arrest and a statement of the rights contained in G. S. 20-16.2. This form is signed by the arresting officer, the chemical test operator, the defendant, if willing, and provides for a statement as to whether the test was refused and if not the date and time of the test and the test results. When the defendant refuses to take the test the original is submitted to the the Drivers License Section of the Division of Motor Vehicles. The first copy is given to the defendant and the second copy is retained by the arresting officer. A third copy may be attached to the warrant. When the defendant submits to the test, the original is sent to the district first sergeant for review and then given back to the arresting officer. The first copy is given to the defendant and the second copy may be attached to the warrant. The question presented is whether the copy maintained by the police officer (either sent to the first sergeant and returned or maintained by the officer at all times) is a public record and subject to inspection. It is clear that such a record should not be open to inspection. It is part of the evidence in a criminal trial and is maintained by the law enforcement officer. As stated above, his copy is not subject to inspection.

The Alcoholic Influence Report Form (Hp-327) is completed by the arresting officer. The arresting officer records his observations, the defendant's performance on certain tests and the defendant's answers to certain questions. Other data is also contained. This form is merely provided to allow the officer to record his findings. The original is maintained by the arresting officer and the copy is submitted to troop headquarters. If the defendant refuses, then a copy of the front page of the AIR form is submitted to the Drivers License Section of the Division of Motor Vehicles. Again, this information would be the notes, reports and memoranda of the law enforcement officer and not subject to disclosure while maintained by the officer.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Assistant Attorney General

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22 November 1978

Subject: Labor; The Uniform Wage Payment Law; Effect upon deductions from pay.

Requested by: The Honorable J. Taylor McMillan
Deputy Commissioner of Labor

Mr. W. James Easterly, Director
State Employment Standards Division
N. C. Department of Labor

Questions: (1) Is a deduction from wages for a cash or merchandise shortage a violation of the Uniform Wage Payment Law?

(2) Does a formula for wage payment including deductions of shortages, in any form, comply with the Uniform Wage Payment Law?

Conclusions: (1) Yes.

(2) No.

This Office has previously held that any deduction from an employee's wages for cash and merchandise shortages which has the effect of reducing his rate of compensation below that prescribed by G.S. 95-87 is a violation of the Minimum Wage Law. 43 N.C.A G. 332 (1974). You now ask if an employer's practice of deducting cash and merchandise shortages from the wages of an employee is a violation of the Uniform Wage Payment Law, G.S. 95-161, *et seq.*

The Uniform Wage Payment Law became effective on January 1, 1976. It requires an employer to pay his employees on a timely

and regular basis and prohibits any withholding of wages, except as expressly permitted.

G.S. 95-166 deals with the withholding of wages. It provides, in pertinent part:

> "No employer may withhold or divert any portion of an employee's wages unless:
>
> (2) the employer has a written authorization from the employee for deductions of a lawful purpose *accruing to the benefit of the employee* as provided in regulations issued by the Commissioner." (Emphasis added)

The language of this section is clear and unambiguous. An employer may not withhold any wages of his employee unless he has written authorization and unless it accures to the benefit of the employee. The withholding of wages by an employer to account for cash register or merchandise shortages clearly does not accrue to the benefit of the employee. This is expressly recognized in the regulations of the Commissioner adopted pursuant to the directions of G.S. 95-166(2):

> "No employer may withhold cash register or inventory shortages or other losses or damages to property or delinquent checks which an employee has endorsed." 13 NCAC 9C.0304(b)

That it was the intention of the General Assembly in enacting the Uniform Wage Payment Law to prohibit employers from withholding the wages of an employee to account for cash register or merchandise shortages is confirmed by reference to G.S. 95-163. This section requires than an employer pay his employees "on or before the current pay day all the wages and tips accruing to said employee." It is then stated:

> "The employer shall not withhold any wages and tips as security for the performance of assigned tasks."

We note that the prohibition against an employer withholding wages

of his employees to account for cash register or merchandise shortages may not be circumvented by means of a private agreement between the employer and the employee. G.S. 95-168 specifically provides that "no provision of this Article may in any way be contravened or set aside by private agreement."

A second problem has been presented in the form of employer wage payment schemes attempting to penalize employees for cash or inventory shortages while giving the appearance of compliance with the law.

For example, payment of a "bonus" for not having cash or inventory shortages has the same effect as deducting the shortage from the employee's wages.

G.S. 95-161(f) states:

> "(f) the term 'wages' means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, *or other basis of calculation.*" (Emphasis supplied)

This statute makes it clear that the General Assembly intended that the Uniform Wage Payment Law apply to all wages, without regard to the method of computation.

In our opinion, any method of computing wages which results in a disparity between wages paid for comparable work due to a formula including cash or inventory shortages would constitute a violation of the Uniform Wage Payment Law of North Carolina.

Rufus L. Edmisten, Attorney General
George W. Lennon
Associate Attorney General

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7 December 1978

Subject: Municipalities; Operation of Water and Sewage Facilities by State Agencies;

Jurisdiction of the North Carolina Utilities Commission

Requested by: D. A. Phillips, Chairman
Wanchese Harbor Commission

Questions: (1) May the Wanchese Harbor Commission on its own authority operate water and sewage facilities within the Wanchese Industrial Park and bill the tenants therein for services rendered?

(2) May the Commission on its own authority extend such services to persons who are not tenants of the Industrial Park?

Conclusions: (1) Yes.

(2) Yes.

The inquiry referred to this Office indicates that the N.C. State Ports Authority has formed the Wanchese Harbor Commission for the purpose of studying and developing a facility to be known as the Wanchese Harbor Industrial Park. The Park will be owned by the State of North Carolina and operated by the Wanchese Harbor Commission or a successor agency created by the Legislature. Industrial tenants would lease space in the Park from the State. Among the services to be provided the tenants are water and sewage treatment facilities. The inquiry questions whether the agency operating the Industrial Park would require certificates or licenses from the N.C. Utilities Commission in order to provide these services to tenants of the Industrial Park or to persons outside the Park who should desire to "tap on" to the facilities developed by the State.

It is the opinion of this Office that the operation of the facilities in question by the State of North Carolina, or any agency thereof, is not subject to regulation by the N.C. Utilities Commission.

The N.C. Utilities Commission is ad administrative agency created by statute and has no authority except as conferred upon it by

Chapter 62 of the General Statutes. N.C.G.S. 62-2 vests in the Commission the authority "to regulate *public utilities....*" (Emphasis added). N.C.G.S. 62-3(23) defines the term "public utility," and the State (or any agency thereof) is not included in that definition. The courts have held that since the statute does not include the state in the definition of a public utility, the Commission has no authority over it. *Utilities Commission v. Chapel Hill Telephone Co.* 12 N.C. App. 543, 183 SE 2d 802 (1971) (cert. denied 279 N.C. 729). Later the Legislature specifically included the University of North Carolina in its definition of a public utility (N.C. G.S. 62-3(23(e), thereby at least by implication excluding all other agencies of the State.

It is clear that "(o)ne does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a public utility as defined in G.S. 62-3(23)." *Utilities Commission v. Carolina Telephone and Telegraph Company*, 267 N.C. 257, 148 SE 2d 100 (1966). It follows that the State may construct and operate its proposed facilities at Wanchese Harbor without regulation by the State.

We note that the Resolution of the North Carolina State Ports Authority dated March 14, 1978, which established the Wanchese Harbor Commission, states that "the 1979 General Assembly is expected to create an agency to administer and manage the Park." In order to eliminate absolutely any question as to the authority of the Utilities Commission over the operation of the facilities in question, it may be helpful to have that agency added to those listed in G.S. 62-3(23)d as being specifically excluded from the Commission's authority. This would only be a precautionary measure, however, since we do not feel that the Harbor Commission or its successor agency would be subject to regulation by the Utilities Commission in any event.

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Dennis P. Myers
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- - -

28 December 1978

Subject: Banks and Banking: Foreign Corporations

Requested by: Commissioner of Banks

Question: May a national or state bank domiciled in a state other than North Carolina, which is acting as a trustee in its home state, purchase income producing real property in North Carolina under a lease-back arrangement?

Conclusion: Yes, provided it is not part of a continuous scheme of Business dealings in North Carolina.

Introduction

On 28 July 1976 an informal opinion was issued by this Office expressing the view that a national bank, domiciled in another state, could not purchase income producing property in North Carolina as a trustee, under a lease-back arrangement. That conclusion rested upon a prior formal opinion reaching the same result respecting a foreign state bank. *Op. N.C. Attorney General* 37 Biennial Rep. 20 (1964). The premises were 1) a foreign bank cannot qualify to "do business" in North Carolina and 2) the transaction in question amounted to "doing business".

Serious questions have been raised concerning these two opinions and are the predication for this re-evaluation.

The legal principles which apply to the resolution of the question presented differ for national and state banks. Therefore, each will be discussed separately.

National Banks

Chief Justice John Marshall held, early in the life of the Federal Constitution that states have no power by taxation *or otherwise* to retard, impede or in any way interfere with the operations of

a bank created by act of Congress. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). It was clearly intended by those in federal government, from the inception, that national banks would do business in every state of the Union. *See, e.g.* Alexander J. Dallas, "Proposal for a National Bank", (1811). reprinted in 4 *The Annals of America* 406 (1968). Justice Marshall found protection for that purpose in a conjunctive reading of the Necessary and Proper Clause, U.S. Const. Article I, §8 and the Supremecy Clause, U.S. Const. Article 6. *M'Culloch v. Maryland, supra.*

Our own Supreme Court has fully recognized this limitation on state power. *Board of Commissioners v. First Nat'l Bank of Snow Hill*, 194 N.C. 475, 140 S.E. 208 (1927). Indeed, the Court has gone so far as to say that a national bank is not a foreign corporation having property or doing business in North Carolina under a license, express or implied, from this State, *Leggett v. Federal Land Bank*, 204 N.C. 151, 167 S.E. 557 (1933).

The only qualification is that the dealings and contracts of national banks are governed by general state laws so long as they do not conflict with the laws of the United States, or frustrate the purpose for which the national banks were created or impair their efficiency. *Waite v. Dawley*, 94 U.S. 527 (1876).

It is also instructive to note that all of the Attorney General's opinions which considered the issue prior to 1976 expressly excluded out-of-state national banks from the proscription against doing business in North Carolina. *Op. N.C. Attorney General*, 2 Dec. 1963; *Op. N.C. Attorney General*, 25 Biennial Rep. 219 (1940).

Foreign State Banks

Foreign state banks may not do business in North Carolina since 1) there is no provision in the banking act, Chapter 53, for the qualification of out-of-state banks and 2) while the Legislature has determined that the banking business needs supervision it gave the Commissioner of Banks no supervisory powers over banks other than those created under North Carolina law. G.S. 53-104. As a matter of policy, then, foreign state banks should not be allowed to do business here. *See, e.g., Op. N.C. Attorney General.*, 37 Biennial Rep. 20 (1964); *Op. N.C. Attorney General*, 26 Biennial Rep. 295 (1941).

There appears to be no constitutional objection to this position. *Ashley v. Ryan*, 153 U.S. 436 (1894); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet) 519 (1839).

What is at question here is whether the purchase of income producing property under a lease-back arrangement amounts to "doing business"? Three informal opinions of this Office, although citing no authority, have answered this question in the affirmative. *Op. N.C. Attorney General*, 4 January 1960; *Op. N.C. Attorney General*, 17 May 1955; *Op. N.C. Attorney General*, 29 June 1951. See, also *Op. N.C. Attorney General*, 5 August 1941.

The case law seems contrary to these opinions.

In *Baden v. Washington Loan & Trust Co.*, 133 Md. 602, 105 A. 860 (1919) it was held that a trust company incorporated in another state and administering a trust therein is not "doing business" within another state for the purposes of a corporate qualification statute by making a contract to sell real estate owned by the trust estate in that state. It was reasoned that this was an isolated transaction and merely incidental to the execution of a trust which had its inception and was being principally administered at the domicile of the foreign corporation.

Although the case *sub-judice* involves a lease, that is a single transaction somewhat akin to a sale of the property for a term of years and more closely approaches an isolated transaction than the idea of "doing business". *See, generally, Lambert v. Schell*, 235 N.C. 21, 69 S.E.2d 11 (1952); *Parris v. Fischer*, 219 N.C. 292, 13 S.E.2d 540 (1941), *Ruark v. Trust Co.*, 206 N.C. 564, 174 S.E. 441 (1934); *Op. N.C. Attorney General*, 3 November 1931.

In *Cleveland Trust Co. v. Comm'r of Internal Revenue*, 115 F.2d 481 (6th Cir. 1940), it was specifically held that the mere receipt of income from leased property and its distribution to cestuis que trustent amounts to no more than receiving the ordinary fruits that arise from the ownership of property and does not constitute doing business for tax purposes.

Generally, the Courts require a much stronger showing of in-state activities in order to invoke the sanctions of corporate qualification

statutes than is required to subject the foreign corporation to local taxation or to state court jurisdiction through service of process. 36 Am. Jur. 2d. *Foreign Corporations*, §324 (1968).

An indication of the direction our courts might take is found in *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946), where in deciding that a foreign corporation was doing business in North Carolina for jurisdictional purposes the Supreme Court said,

> Looking through the form to the substance, it is apparent *more than* the *mere* relationship of lessor-lessee was contemplated. 226 N.C. at 188, (Emphasis added).

This opinion does not extend to those situations where the purchase and lease-back transaction is part of a continuous scheme of business transactions in North Carolina or where the corporation was established for the very purpose of engaging in such dealings. *See, S & A Realty Co. v. Hi burn*, 249 So.2d 379 (Miss. 1971); Annot. 59 A.L.R.2d 1131 (1958).

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January 1, 1979 through June 30, 1979

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2 January 1979

Subject: General Assembly; Perrogative of a member of the General Assembly to require State officials and officers to furnish to the member otherwise confidential state personnel information; N.C.G.S. 120-19; 126-24(3)

Requested by: Honorable John T. Henley
President Pro Tempore of the Senate

Honorable Carl J. Stewart, Jr.
Speaker of the House of Representatives

Question: Must a member of the General Assembly also be a member of a Committee of the General Assembly, investigative or otherwise, to envoke N.C.G.S. 120-19 to gain access to otherwise confidential state personnel information?

Conclusion: No, so long as the information sought is, or appears necessary to the fulfillment of the requestor's duties and responsibilities as a member of the General Assembly.

Article 7 of Chapter 126 of the General Statutes of North Carolina deals generally with information contained in the personnel files of State employees. Some of the information contained in these personnel files is considered public information available to any citizen upon request. N.C.G.S. 126-23. However, the majority of information contained in employee personnel files is considered confidential, and may be released only to certain statutorily designated individuals, among those being "(m)embers of the General Assembly who may inspect and examine personnel records under the authority of G.S. 129-19." N.C.G.S. 126-24(3).

N.C.G.S. 120-19 provides:

"All officers, agents, agencies and departments of the State are required to give to any committee of the General Assembly, upon request, all information and all data within their possession, or ascertainable from their records. This requirement is mandatory *and shall include requests made by any individual member of the General Assembly* or any of its committees or chairmen thereof." (Emphasis added)

Although N.C.G.S. 120-19 is subject to a different interpretation, we conclude that this statute allows "any individual member of the General Assembly" to request information contained in the personnel records of a State employee which is otherwise considered confidential, notwithstanding the fact that at the time the request is made, the individual member of the General Assembly is not acting in his capacity as a member of some committee of the General Assembly. We assume, of course, that in making the request the member feels that such information is necessary to fulfill his responsibilities and duties as a member of the General Assembly.

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Senior Deputy Attorney General

- - -

12 January 1979

Subject: Public Records; Confidentiality of Records; Social Services; Child Support; Public Officers and Employees; State Departments, Institutions and Agencies; Counties; Municipalities

Requested by: Mr. Philip Powell
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Question: Must State, county, and city officials having custody of personnel records of

their respective employees (both past and present) furnish otherwise confidential locational information concerning these employees to the Department of Human Resources when, at the request of a designated local Child Support Enforcement Program representative, the Department is fulfilling its obligations under G.S. 110-139 to locate responsible parents for purposes of establishing and enforcing their child support obligations as levied by Article 9, Chapter 110.

Conclusion: Yes.

Since the State (Article 7, Chapter 126) and the county (G.S. 153A-98) confidentiality statutes are in substance the same as the statute for municipalities (G.S. 160A-168), the reasoning of the Attorney General's Opinion (45 N.C.A.G. 289 (1976)) covering municipal personnel records would apply equally to the county and state personnel records. Consequently, city, county, and state officials must release otherwise confidential personnel file information to the Department of Human Resources for satisfaction of the Child Support Enforcement Program's responsible parent locational obligations. The crux of G.S. 110-139 reads:

> "...All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, *notwithstanding any provision of law making such information confidential.* ..." (Emphasis supplied)

A critical point for consideration is whether the analogous provisions to G.S. 160A-168(c)(5) for municipal personnel records in the State (G.S. 126-24(5)) and the county (G.S. 153A-98(c)(5)) statutes, prohibit the release of otherwise confidential personnel information for use in criminal prosecutions-like criminal nonsupport-when the information is sought under the authority of G.S. 110-139.

The relevant sections of the State, county, and municipal confidentiality statutes read as follows:

> "All other information contained in a personnel file is confidential and shall not be open for inspection and examination except to the following persons: ...
>
> > An official of an agency of the federal government, State government or any political subdivision thereof. Such an official may inspect any personnel records when such inspection is deemed by the department head of the employee whose record is to be inspected or, in the case of an applicant for employment or a former employee, by the department head of the agency in which the record is maintained as necessary and essential to the pursuance of a proper function of said agency; provided, *however, that such information shall not be divulged for purposes of assisting in a criminal prosecution*, nor for purposes of assisting in a tax investigation." G.S. 126-24(5). (Emphasis supplied)

"All information contained in a (county) (city) employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:

> An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency, *but no information shall be divulged for the purpose of assisting in a criminal prosecution of the employee*, or for the purpose of assisting in an investigation of the employee's tax liability." G.S. 153A-98(c)(5); G.S. 160A-168(c)(5). (Emphasis supplied)

Although a prior Attorney General's opinion, 45 N.C.A.G. 289 (1976) addressed this issue for municipal personnel records under the law in existence at that time, subsequent changes in the law justify a re-examination and redisposition of this issue. The change in the status of the law since the former opinion is based on another prior Attorney General's Opinion found at 47 N.C.A.G. 42 (1977) interpreting a Child Support Enforcement Program Agent to have the authority to institute criminal proceedings for nonsupport. The change is also based on recent legislation (N.C. 2nd Sess. Laws, c. 1186, s. 4 (1977)) which clearly gives an agent such authority. See G.S. 110-130.

Initially, the resolution of this issue must begin with an examination of the Federal enabling legislation, P.L. 93-647 (January 4, 1975), on which the enactment of Article 9, Chapter 110 is based. In part, a provision of that legislation states:

> "A State plan for child support must ... provide that the agency administering the plan will establish a service to locate absent parents utilizing ... *all sources of information and available records* ...." 42 U.S.C. 654(8)(A). (Emphasis supplied)

Accordingly, the State Plan submitted to the Department of Health, Education, and Welfare reads as follows:

> "*Parent Locator Service*
>
> The IV-D agency has established and will maintain a parent locator service utilizing:
>
> (a) all sources of information and records available in the State, and in other states as appropriate; ..." N.C. State Plan for the Child Support Enforcement Program, §2.10 effective date August 1, 1975.

Moreover, an examination of the legislative history reflects a Congressional intent that states first make use of local and state mechanisms for tracing absent parents before being allowed to use the Federal Parent Locator Service (Federal PLS) established by 42

U.S.C. 653. 4 *U.S. Cong. & Adm. News* 8152 (1974). Consequently, the following provision was promulgated in the Federal Register:

> "However, prior to the submission of any request to the Federal PLS, ... the State PLS (Parent Locator Service) must first make diligent and reasonable efforts to locate an absent parent." 43 F.R. 33248 (July 31, 1978) modifying in part, 45 C.F.R. § 302.35 (c) (3).

The corresponding section of the State Program Plan as submitted to the Department of Health, Education and Welfare reads:

> "The State PLS makes reasonable and diligent efforts to locate the absent parent with respect to requests for location made by individuals ... prior to the submission of any of these requests to the Federal PLS." North Carolina State Plan for Child Support Enforcement Program, §2.10-5 as modified effective July 31, 1978.

Clearly, Congress intended, with only tow specific exceptions, that once a request makes its way to the Federal PLS, no information, confidential or otherwise, should escape scrutiny. This Congressional intent is reflected by the fact that on January 4, 1975, Congress enacted a section of P.L. 93-657, later codified as 42 U.S.C. §653 (e) (1) - (2) which reads in part:

> "Whenever the Secretary (of Health, Education and Welfare) receives a request (for locational information) submitted under subsection (b) of this Section which he is reasonably satisfied meets the criteria established by subsections (a), (b), and (c) of this section, he shall promptly undertake to provide the information requested from the files and records maintained by any of the departments, agencies, or instrumentalities of the United States *or of any State. Notwithstanding any other provision of law,* whenever the individual who is the head of any department, agency, or instrumentality of the United States receives a request from the Secretary for information authorized to be provided by the Secretary under this section, such

> individual shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality with a view to determining whether the information requested is contained in any such files or records. If such search discloses the information requested, such individual shall immediately transmit such information to the Secretary, *except that if any information is obtained the disclosure of which would contravene national policy or security interests of the United States or the confidentiality of census data*, such information shall not be transmitted and such individual shall immediately notify the Secretary." (Emphasis supplied)

Unquestionably, Congress envisioned that the enactment of this provision exempting all Program parent locator inquiries from all State and Federal confidentiality statutes (with only the two referenced exceptions) could result in the use of information obtained thereby in civil or criminal prosecutions. For example, the legislative history specifically refers to Congressional contemplation of criminal prosecution resulting from the above-referenced exemption enabling the obtaining of welfare information, formerly confidential. In part, the legislative history states:

> "The Committee bill would make it clear that this requirement (of general confidentiality) may not be used to prevent a court, prosecuting attorney, tax authority, law enforcement officer, legislative body or other public official from obtaining information required in connection with his official duties such as *obtaining support payments* or prosecuting fraud *or other criminal or civil violations*. 4 *U.S. Cong. & Adm. News* 8152 (1974). (Emphasis supplied)

In enacting the legislation (N.C. Sess. Laws, c. 827, s. 1 (1975)) embodying the confidentiality exemption (specifically G.S. 110-139) for the North Carolina Child Support Enforcement Program established and codified as Article 9, Chapter 110, the North Carolina General Assembly apparently intended to without exception pre-empt all State confidentiality statutes and to track

the broad exemption granted by the aforereferenced Federal enabling legislation. This State confidentiality exemption must have been intended to pre-empt even the general prohibition of the use of personnel information for criminal prosecution–such as for criminal nonsupport. The opposite interpretation would lead to the anomalous result of the State merely obtaining the same information from the Secretary of Health, Education and Welfare under the Federal Parent Locator system pursuant to his broad confidentiality exemption based on 42 U.S.C. 653 (e) (1)-(2), discussed above. Thereafter, the Child Support Enforcement Program representative would be obligated by both Federal and State law to proceed with the same information (although from a different source) in potentially a criminal action. As hereinafter indicated the Federal enabling legislation construed with a provision of the State legislation reflects the General Assembly's intention to have conformity with the Federal legislation.

> "The support rights assigned to the State under Section 602(a) (26) (42 USCS § 602(a)(26)) shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under *all applicable State and local processes.*" 42 U.S.C. 656(a). (Emphasis supplied)

> "*Nothing in this Article (Article 9, Chapter 110) is intended to conflict with any provision of federal law or to result in the loss of federal funds.*" G.S. 110-140. (Emphasis supplied)

A reasonable consequence of this construction is that the State Program representatives are equally obligated to proceed criminally in non-support cases through either Article 40 of Chapter 14 or through Article 1, Chapter 49. Moreover, the intent for conformity must be construed to mandate following the requirements of confidentiality exemptions contained in the Program Federal enabling legislation.

Additionally, as noted in the last paragraph of the previous and more limited Attorney General's opinion on this topic, 45 N.C.A.G. 289 (1976), the above-referenced statutes, G.S. 160A-168(c)(5)

(municipal records), G.S. 153A-98(c)(5) (county records), and G.S. 126-24(5) (state records), were enacted prior to the broad confidentiality exemption of G.S. 110-139. (See N.C. Sess. Laws, c.701, s. 1 (1975) ratified June 23, 1975, covering the normal restriction for municipal and county personnel records and N.C. Sess. Laws, c. 257, s.1 (1975) ratified May 12, 1975, for State personnel records compared with N.C. Sess. Laws, c. 827, s. 1 (1975) ratified June 25, 1975, containing the confidentiality exemption of G.S. 110-139.)

From this chronology of legislative enactments, it must be presumed that the Legislature knew and intended the consequences of pre-emption of normal confidentiality restraints of all State and local government records by the subsequent enactment of the confidentiality exemption of G.S. 110-139.

For all these reasons, the Child Support Enforcement exemption from normal confidentiality restraints under G.S. 110-139 would pre- empt all State, county, and municipality statutes generally maintaining the confidentiality of personnel records even though the representative of the Program may be obtaining locational information from these records which may ultimately assist Program personnel in obtaining support through either criminal or civil proceedings.

Rufus L. Edmisten, Attorney General
R. James Lore
Associate Attorney

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15 January 1979

Subject: Public Officers and Employees; Register of Deeds; Counties; Who May Have Keys to Office of Register of Deeds.

Requested by: Lula Heath
Register of Deeds
Snow Hill, N. C.

Question: What person has the authority to determine who shall have keys to the office of the register of deeds?

Conclusion: Since the register of deeds is required to keep public records, and is required by law to be bonded for the safekeeping of the books and records, only the register of deeds has the authority to determine which persons shall have keys to his office and access thereto.

G.S. 153A-169 requires the board of county commissioners to supervise the maintenance, repair and use of county property. The board has the authority to designate the location of county offices.

However, the register of deeds is an elected public official and under Chapter 161 of the General Statutes is required to perform certain duties and he is responsible for the safekeeping of the books and records filed in the office.

The bond required by G.S. 161-4 is conditioned upon the safekeeping of the books and records by the register of deeds and his assistant and deputy registers of deeds and the faithful discharge of his and their duties.

Clearly, if the register of deeds did not have control of the keys to his office, there would be no way that he could be responsible for the safekeeping of the books and records and the entries made therein.

We conclude therefore, that the register of deeds determines who will have keys to his office.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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22 January 1979

Subject: Sheriff; Execution; Duty of Sheriff to Discover Property of Judgment Debtor.

Requested by: Sheriff Lewis C. Rosser
Lillington, N. C. 27546

Question: What is the duty of the Sheriff in finding property of the judgment debtor for the purpose of execution of judgment?

Conclusion: The sheriff is required to exercise due diligence to locate property of the judgment debtor. He should make such search and inquiry as a reasonable man would exercise in conduct of his own affairs to find property of the debtor, taking into consideration the other duties of the Sheriff and his Deputies.

In *Parks v. Alexander*, 29 NC 412, the sheriff had made a return of "no property" on an execution without making an effort to find any property or making any demand for payment or inquiry for property.

The Court held that the sheriff could not rely upon a general report that the debtor was insolvent. That it was the duty of the sheriff to go to the debtor's house in search of property to levy on; that he should make demand for payment and inquiry for property. The Court stated: "We may be very certain that if the debt had been the sheriff's own, he would have made inquiries which would have led to the seizure and sale of the debtor's property." 29 N.C. at 414.

The general rule is that the sheriff must exercise due diligence to locate the debtor's property.

Due diligence means reasonable diligence, such as a prudent man would exercise in the conduct of his own affairs to protect his own rights and interest. That which is reasonable under the circumstances.

Due diligence is not measured by any absolute standard, but depends on the relative facts of each case and the other duties of the Sheriff and his Deputies may be taken into account. Black's Law Dictionary, 3d Ed.; 80 C.J.S., Sheriffs and Constables, Sec. 44, Sec. 45; 157 ALR 196, 204.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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24 January 1979

Subject: Motor Vehicles; Streets and Highways; Subdivision Streets; Public Streets

Requested by: Edward H. McCormick
County Attorney
Johnston County

Question: Are the motor vehicle laws relating to speeding, drunken driving and reckless driving applicable to subdivision streets open to vehicular traffic and located outside of municipalities but which are not on the State Highway System?

Conclusion: No. The motor vehicle laws listed are applicable only to "streets or highways" *open to the public as a matter of right* and to "public vehicular areas" as defined in Chapter 20. The subdivision streets are not *open to the public as a matter of right* until they have been accepted on behalf of the public in a manner recognized by law, nor do they come within the statutory definition of "public vehicular area".

The county attorney for the County of Johnston inquires as to the status of the subdivision streets outside of municipalities in Johnston

County which are not on the State Highway System. He advises there is no subdivision ordinance in effect as it relates to the streets nor has there been an acceptance of the offer of dedication of the streets by a public authority. He raises the question of the applicability of drunken driving, reckless driving and speeding laws to these streets.

Chapter 20 of the General Statutes makes each of the foregoing offenses applicable to "highways" and "public vehicular areas". G.S. 20-138; G.S. 20-140; G.S. 20-141. Chapter 20 contains the following pertinent definitions for the purpose of the Chapter.

> G.S. 20-4.01(13) - "Highway or Street - The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the *use of the public as a matter of right* for the purpose of vehicular traffic. The terms 'highway' or 'street' or a combination of the two terms shall be used synonymously."
>
> G.S. 20-4.01(30) - "Private Drive or Driveway - Every road or driveway *not open to the use of the public as a matter of right* for the purpose of vehicular traffic."
>
> G.S. 20-4.01(32) - "Public Vehicular Area - Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public."

The question is presented as to whether or not these streets are "open to the public as a matter of right" and thus making the listed motor vehicle laws applicable to them. Our court on several occasions has dealt with the question of the right of the public

in subdivision streets which have not been accepted by public authorities in a recognized manner. In the case of *Chesson v. Jordan*, 224 N.C. 289, 291, our court stated that:

> "According to the current of decisions in this Court there can be in this State no public road or highway unless it be one either established by the public authorities in a proceeding regularly instituted before the proper tribunal; or one generally used by the public and over which the proper authorities have asserted control for the period of twenty years or more; or one dedicated to the public by the owner of the soil *with the sanction of the authorities and for the maintenance and operation of which they are responsible*." (Emphasis added)

In the case of *Owens v. Elliott*, 258 N.C. 314, 317, the Supreme Court stated as follows:

> "Where lots are sold and conveyed by reference to a map which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and a purchaser of a lot located in the subdivision acquires the right to have all and each of the streets kept open and it makes no difference whether the streets be in fact open or accepted by the appropriate public authority. However, the dedication referred to in the preceding sentence, insofar as the general public is concerned, without reference to any claim or equity of the purchasers of lots in the subdivision, is but a revocable offer and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them." (Emphasis added)

The case of *Owens v. Elliott, supra* involved the right of a person who purchased a lot outside of the boundaries of the subdivision, with respect to the right in the streets within the subdivision. The court held as follows:

> "Even if the Street has been opened and is in use for the purposes of the persons owning lots in the subdivision, if the offer of dedication has not been accepted by the proper public authorities or in a manner recognized by law, the owner of the lot outside the subdivision has no right to use the street by reason of any purported dedication. . .Where streets have been laid out and opened in a duly established subdivision and the proffered dedication of the streets has not been accepted on behalf of the general public in a manner recognized in law, *if a member of the general public, not a resident of or owner of land in the subdivision, uses the streets for his own purposes and convenience, such use is at best permissive and not of right.*" (Emphasis added)

The Supreme Court, in 1965 in line with the prior cases, stated that:

> "The streets of a subdivision are not dedicated to the public merely by reason of the subdivision of the land and the recordation of a map thereof. This is only an offer to dedicate; dedication to the public is complete only when the offer is accepted by the responsible public authority, and neither the burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to accept and assume them." *Wofford v. Highway Commission*, 263 N.C. 677 683. See also *Oliver v. Ernul*, 277 N.C. 591, 598. For a further discussion see 41 N. C. L. 875 and 42 N. C. L. 706.

In view of the holding by the Supreme Court that the use by the public of these subdivision streets prior to acceptance by a public authority is a permissive use and is not as a matter of right, the streets inquired about do not come within the definition of the words "street or highway" contained in Chapter 20. Neither are the streets included in the statutory definition of "public vehicular area". A "private drive" is defined as one *not opened to public as a matter of right*. Therefore, it is the opinion of this Office that for the purpose of motor vehicular laws the streets are "private

drives" and the provisions of the reckless driving, the drunken driving and speeding statutes (G.S. 20-141, G.S. 20-140 and G.S. 20-138) are not applicable to the subdivision streets which have not been accepted on behalf of the general public in a manner recognized by law.

This Office suggests that the legislature clarify the application of the motor vehicle laws to these streets. This opinion modifies an earlier opinion appearing in 44 NCAG 314.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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25 January 1979

Subject: Licenses and Licensing; Licenses and Permits; General Contractors

Requested by: James M. Wells, Jr.
Secretary-Treasurer
General Contractors' Licensing Board

Question: 1. Is a builder required to have a general contractor's license under the provisions of G.S. 87-1 et. seq. where pursuant to a contract with a purchaser, he constructs a building on the builder's land for a contract price of $30,000 or more?

2. Is a builder required to have a general contractor's license under the provisions of G.S. 87-1 et. seq. where a *purchaser* pursuant to a contract conveys a lot to the builder to construct a house for the purchaser for a price of $30,000 or more?

3. Is a person employed by an owner for the overall supervision and control of the construction of a building costing in excess of $30,000 required to be licensed?

Conclusion: 1. and 2. Yes.

In each case where a builder contracts to build a house for another party at a contract price in excess of $30,000, he is required to have a general contractor's license regardless of the ownership of the land upon which it is built.

3. Yes.

A person employed by the owner for the overall supervision and control of the construction of a building costing in excess of $30,000 is required to have a general contractor's license.

A clarification of the requirement for a general contractor's license was requested in the case where a builder enters into a contract with a purchaser to construct a building on the builder's land for a contract price of $30,000 or more. A further clarification was requested for the requirement of a license of a builder in the case where a purchaser, pursuant to a contract with a builder, conveys a lot to a builder to construct a home for the purchaser for a price of $30,000 or more.

Article 1 of Chapter 87 of the General Statutes prohibits any *contractor* who has not passed the examination and secured a license as therein provided from undertaking to construct a building costing $30,000 or more. G.S. 87-1 provides that ". . . one who for a fixed price, commission, fee or wage, undertakes . . . to construct any building . . . where the cost of the undertaking is $30,000 or more" is a general contractor and required to be licensed. G.S. 87-13 provides that any person, firm or corporation not being duly licensed who *shall contract for or bid upon the construction* of any of the projects or works enumerated in G.S. 87-1 shall be guilty of a misdemeanor.

The statute prohibits the *contracting for*, or the bidding upon, the construction for a fixed price, commission, fee or wage without a license. The purpose of the licensing requirement is to protect the public from incompetent builders. *Vogel v. Supply Company*, 277 N.C. 119, 120. The statute does not qualify the definition of a general contractor by *ownership* of the land on which the improvement is undertaken. Therefore, it is the opinion of this Office that in each of these cases it is a violation of the provisions of G.S. 87-1 et. seq. for the builder to enter into a contract for construction without having the applicable general contractor's license under Article I of Chapter 87. This Office has on several occasions advised that the licensing statute is not applicable to an individual constructing a building on his own property and he is not required to be licensed. However, we do not believe the cases of inapplicability of the statute to an owner can be extended to cases where there is a *contract* for the construction of a building for another party for a fixed price, commission, fee or wage.

The secretary of the licensing board further requests a clarification of the licensing requirement in the case where an owner employs an individual for the overall supervision and construction of a building on the owner's property where the improvements are in excess of $30,000. The prior opinions of this Office have advised that such a person, where employed by the owner on a salary, wage, commission or fixed fee, having overall supervision is required to be licensed. In the case of *Helms v. Dawkins*, 32 N. C. App. 453, 456, the court said that within the meaning of the contractor's licensing statute, "the principal characteristic distinguishing a general contractor from . . . a mere employee, . . . is the degree of control to be exercised by the contractor over the construction of the entire project." In the case of *Furniture Mart v. Burns*, 31 N. C. App. 626, 632, the court indicated that there is no absolute rule requiring a contractor's license in case of persons employed to act as a construction supervisor. It was indicated by the court in that case that an employee of the owner who undertakes the construction of such a building and has overall authority and control over the construction is a general contractor within the meaning of the licensing statute. Therefore this Office is of the opinion that an employee of an owner who has overall supervision and control of a construction project where the cost is $30,000 or more, is required to have a general contractor's license.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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1 February 1979

Subject: Municipalities; Ordinances; Extra Territorial Jurisdiction; Airport Authorities; Nondiscrimination Agreement

Requested by: Charles H. Young
Attorney for the Raleigh-Durham Airport Authority

Question: Is the City of Raleigh authorized to require the Raleigh-Durham Airport Authority to enter into a nondiscrimination agreement relating to the operation of the airport as a condition for receiving payments for direct operation of the airport pursuant to statutory authority setting up the airport authority?

Conclusion: No. The Airport Authority is governed by the members of the authority, and the City of Raleigh has no authority to determine the policies or control the airport except in the manner as provided by statute by appointing two of its members.

The Raleigh-Durham Airport Authority was established pursuant to Chapter 168 of the 1939 Session Laws, as amended. The laws authorize the cities of Raleigh and Durham and the counties of Wake and Durham each to appoint two members of the Airport Authority. The Authority is authorized to operate and make rules and regulations necessary for the operation of the airport. The local governments are authorized to appropriate money necessary for the operation of the airport authority.

The City of Raleigh made an appropriation of $12,500 to the Raleigh-Durham Airport Authority. A municipal ordinance makes such a grant or appropriation subject to a condition that the Raleigh-Durham Airport Authority execute a nondiscrimination agreement providing that the Authority will not discriminate in the operation of the airport. The attorney for the Raleigh-Durham Airport Authority advised the Authority that in his opinion the Authority cannot properly contract away the legal authority of the members of the Authority to control and direct the operation of the airport by entering into a separate agreement with the City of Raleigh. He advised that there is no specific statutory authority authorizing the Airport Authority to contract with anyone of the four governmental units with respect to the manner in which the airport shall be operated. He requested an opinion of this Office as to the propriety of the entering into the agreement.

The status of the Greensboro-High Point Airport Authority was discussed in the case of *Airport Authority v. Johnson*, 226 N.C. 1. As the purpose of the two authorities is the same and the statutes setting up the Raleigh-Durham Authority are similar, excerpts from that case are set out as we feel they are applicable to the present situation.

> "The plaintiff Airport Authority is neither a private corporation nor a political territorial subdivision. It is *quasi-municipal* corporation of a type known since *McCulloch v. Maryland*, 4 Wheat. 316, and commonly used in this and other states to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care." 226 N.C. at 9.
>
> "In considering questions concerning the powers conferred on the *quasi-municipal* corporation and the control over it exercised by the municipality with which it is connected, it must be remembered that counties, cities and towns drive practically all their powers from the Legislature, through appropriate statutory law, rather than constitutional grants; and the Legislature, in implementing their functions or in creating a separate corporate agency to serve a

particular governmental purpose, is not bound by the limitations of the general statute under which the municipalities are formed or the special charters and laws delimiting their authority. It may give to these specially created agencies such powers and call upon them to perform such functions as the Legislature may deem best." 226 N.C. at 9, 10.

"In so far as constitutional restrictions are concerned, the General Assembly may distribute the functions of a municipality as it may deem best, the only limitation being its own sound judgment in creating a unified and efficient government. By the exercise of the same sound judgment and legislative discretion, *it may, as it has attempted here to do, create a more or less antonomous agency, giving to the municipality only such control as it may consider advisable* where the particular functions to be performed involve great detail and complexity, and demand close attention and skilled personnel. Perhaps in no other way could continuity and efficiency in the service be secured against political changes and petty directives." 226 N.C. at 10. (Emphasis added)

"*In the type of corporation we have here control is ordinarily given, as it is here, by a representative directorate chosen by the governing bodies concerned*, with such other provisions in the Act as will insure to the municipality the integrity of the operations and their continued employment in aid of the public purpose being promoted." 226 N.C. 16 10. (Emphasis added)

We have reviewed the Session Laws setting up the Raleigh-Durham Airport Authority and providing for its operation by the members of the Authority which are appointed by the four governmental units. These Session Laws make no provision for the control of the airport by the City of Raleigh except through the appointment of two members of the Authority.

We believe that the City of Raleigh has no authority to determine the policy of the Airport Authority by such an ordinance. A city

or town in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the General Assembly or as are necessarily implied from those expressly so conferred. *Town of Conover v. Jolly*, 277 N. C. 439, 443. A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits. Its charter is the legislative description of the power to be exercised and the boundaries within which these powers may be exercised. Neither city charter nor ordinance enacted pursuant thereto has extraterritorial effect unless authorized by legislative grant. *Smith v. Winston-Salem*, 247 N. C. 349, 354. In the absence of the grant of such power a city or town may not, by its ordinance, prohibit acts outside its territorial limits. *State v. Furio*, 267 N. C. 353, 356. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. *Smith v. Winston-Salem*, 247 N. C. 349, 354.

No grant of authority has been brought to our attention for the City of Raleigh to control or set the policies of the Airport Authority except by the appointment of two directors, nor do we find any authority for the municipality to project beyond the territorial limits of the city the effect of such an ordinance as the one in question. Therefore, this Office is of the opinion that the Raleigh City Ordinance in question, if applied to the Raleigh-Durham Airport Authority, is not authorized. It is noted that the Federal-aid provisions, with which the Airport Authority is required to comply, appear to encompass the purpose sought to be accomplished by the Raleigh Municipal Ordinance.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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15 February 1979

Subject: Nurse Practice Act; Registered Nurses; Standing Orders of a Physician; Controlled Substances; Performance of Medical Acts by Registered Nurses

Requested by: F. E. Epps
Coordinator of Regulatory Section
Office of Assistant Secretary for Alcohol and Drug Abuse

Questions:

1. May standing orders of a physician, which describe certain conditions and the medications to be given once it has been determined that those conditions exist, be carried out by a registered nurse?

2. May those standing orders be carried out by a registered nurse when the medications described are controlled substances?

Conclusions:

1. Standing orders of a physician, which describe certain conditions and the medications to be given once it has been determined that those conditions exist, may be carried out by a registered nurse if that registered nurse has been approved by the Board of Medical Examiners to perform medical acts.

2. A registered nurse may not carry out standing orders of a physician which involve controlled substances even if that registered nurse has been approved by the Board of Medical Examiners to perform medical acts.

The primary question for determination is whether or not standing orders of a physician, which describe certain conditions and the medications to be given once it has been determined that those conditions exist, may be carried out by a registered nurse.

G.S. 90-18 defines practicing medicine as "diagnosing or attempting to diagnose, treating or attempting to treat...or prescribing for or administering to, or professing to treat any human ailment, physical or mental or any physical injury to or deformity of any other person."

Any act which comes within this definition may be done only by a licensed physician unless the act is specifically authorized by another statute or regulation.

Certain acts are specifically authorized when they are performed by a registered nurse.

G.S. 90-18(14) specifically excepts from the definition of "practicing medicine": "The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the Board of Medical Examiners and the Board of Nursing and adopted by both boards."

These rules and regulations are codified as Subchapter 32E of the North Carolina Administrative Code, and are entitled "Approval of Registered Nurse Performing Medical Acts." These regulations define "registered nurse" as a "registered nurse who is functioning and performing medical tasks at the direction of or under the supervision of a physician licensed to practice medicine in North Carolina, and which nurse is approved by the board defined in the regulations as the Board of Medical Examiners of the State of North Carolina as being qualified by training and experience to perform the functions and tasks outlined in the application at the direction of or under the supervision of a physician."

Standing orders are specifically mentioned in the description of what is meant by the term "under the supervision of a physician." The regulations state that "The backup physician shall be available on a regularly scheduled basis for...review of the registered nurses' practice, between conferences incorporating chart review and co-signing records to document accountability: prescribing within that practice setting, standing orders and drug protocol for interval between conferences to be part of this regular review and documentation." (32E NCAC .0001)

Thus, standing orders of physicians as described herein may be carried out by registered nurses who have been approved by the Board of Medical Examiners under the terms of the regulations and it is the opinion of this Office that the intent of the regulations

is that *only* registered nurses approved by the board may carry out standing orders of a physician.

A secondary question to be determined is whether or not standing orders of a physician which name controlled substances as the medication to be given once it has been determined that certain conditions exist may be carried out by a registered nurse. The regulations state:

> "When the proposed medical functions of a registered nurse include prescribing of drugs, the supervising (backup) physician and the registered nurse shall review the formulary approved by the North Carolina Board of Nursing and the Board of Medical Examiners of the State of North Carolina, and shall acknowledge in the application to the board that they are familiar with the formulary, and that the formulary will be a part of and incorporated in the approved standing orders. Changes in the formulary are to be approved by the board. In regard to changes, the approved formulary may include any over-the-counter or non-prescription drug.
>
> Prescriptions, *except controlled sbustances*, (Emphasis ours) may upon specific orders of the supervising physician, given before the prescription is issued, be written and issued by such registered nurse for the use by patients of drugs which are not included in the formulary.... However, no prescription shall be written or issued by such registered nurse for any drugs which are specified as controlled substances under the Federal Controlled Substances Act." (32 E NCAC .0003)

Thus, it is the opinion of this Office that a registered nurse may not carry out standing orders which involve controlled substances.

Rufus L. Edmisten, Attorney General
Ann Reed
Special Deputy Attorney General

28 March 1979

Subject: Motor Vehicles; Mo-peds

Requested by: Honorable Hollis M. Owen, Jr.
District Court Judge

Question: Does the fact that a bicycle with a helper motor was traveling in excess of 20 miles per hour convert it from an exempt motor vehicle to a motor vehicle within the general statutory definition?

Conclusion: Yes, provided such speed was resultant of the power exerted upon the drive train by the engine.

The statutes relevant to mo-peds or bicycles with helper motors state:

> "§ 20-4.01. *Definitions.*–Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:
>
> (23) Motor Vehicle.–Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. *This shall not include bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour.* (Emphasis added)
>
> (27) Passenger Vehicles.–
>
> d. Motorcycles.–Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding

tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies *and bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour.* (Emphasis added)

(49) Vehicle.–Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those by their nature can have no application."

"§20-50.1. *Certain bicylces with motors exempt.*–Notwithstanding any of the provisions of Chapter 20 of the North Carolina General Statutes, all pedal bicycles with helper motors rated at one brake horsepower or less and incapable of exceeding 20 miles per hour shall be exempt from all title and registration requirements of Chapter 20, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of 16 years."

G.S.20-4.01(23) and G.S. 20-4.01(27)d exempt bicycles with helper motors of less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour while G.S. 20-50.1, though requiring one brake horsepower or less to be exempt, uses the words "and incapable of exceeding 20 miles per hour shall be exempt". It is general knowledge that bicycles without helper motors can, when moved by human power, obtain speeds greater than 20 miles per hour. Acts of the General Assembly relating to the same subject matter must be construed in pari materia

with the intent of the Legislature being the controlling factor as to any interpretation placed thereon (*State Highway Commission v. Hemphill*, 269 N.C. 535, *Shue v. Scheidt*, 252 N.C. 561). Further the lanaguage of the statute will be interpreted to avoid absurd consequences (*Hobbs v. Moore County*, 267 N.C. 665, *State v. Burell*, 256 N.C. 288).

The only logical interpretation of the statutes set out hereinabove is that the test of the horsepower-speed ratio of a bicycle with a helper motor should be as with other vehicles; i.e., on a flat or level paved surface. If a mo-ped or bicycle with helper motor can be accelerated by use of its helper motor to a speed greater than 20 miles per hour on such surface, then it would not fall within the perview of the statutory exemptions and should be classified as a motorcycle.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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28 March 1979

Subject: Uniform Commercial Code; Warehousemen; Liens

Requested by: Resa L. Harris, Legal Officer
Office of the Clerk of Superior Court
Mecklenburg County

Question: May a warehouseman with liens pursuant to both Article 1 of Chapter 44A of the General Statutes and Article 7 of the Uniform Commercial Code enforce his lien pursuant to G.S. §25-7-210 without allowing the owner a judicial hearing pursuant to G.S. §44A-4?

Conclusion: Yes.

A warehouseman in North Carolina may have a lien on goods in his possession covered by a warehouse receipt, or on the proceeds thereof, pursuant to G.S. §25-7-209, which is part of Article 7 of the Uniform Commercial Code. The same warehouseman could have a lien pursuant to Chapter 44A of the General Statutes, specifically G.S. §44A-2(a). If a warehouseman were to pursue his rights solely under the Uniform Commercial Code provisions, he could enforce the lien created in G.S. §25-7-209 pursuant to the provisions of G.S. §25-7-210 by giving appropriate notice and selling the goods at either a public or private sale if all requirements of G.S. 25-7-210 are met. If the same warehouseman were to enforce his lien only under Chapter 44A, the owner or the person with whom the warehouseman dealt would be entitled to a hearing under G.S. §44A-4(b).

The question has arisen whether the warehouseman may proceed solely under G.S. §25-7-210 and sell the goods without the opportunity being given to the owner or bailor for a hearing as would be required under G.S. §44A-4. G.S. §25-7-209 creates a lien on goods or the proceeds of goods which are covered by a warehouse receipt. The lien is only on goods which are in his possession and which he has not unjustifiably refused to deliver. G.S. §25-7-209(4). G.S. §44A-3 provides a lien only for goods in the possession of the lienor, like the Uniform Commercial Code provisions, but does not require a warehouse receipt. Thus, the provisions of Article 7 of the Uniform Commercial Code are special provisions for goods covered by warehouse receipts, bills of lading or other documents of title. In contrast, the provisions of Article 1 of Chapter 44A cover any person who tows, alters, repairs, stores, services, treats or improves personal property other than a motor vehicle in the ordinary course of his business. G.S. §44A-2(a).

The special provisions of Article 7 of the Uniform Commercial Code should be available to the warehouseman even though he also has a lien under Article 1 of Chapter 44A. G.S. §25-7-210(7) specifically provides that "(T)he rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor." Since he has these rights in addition to all other rights that may be provided by law, the warehouseman may choose to proceed solely under Article 7 of the Uniform Commercial Code so long as he relies only on the Provisions of Article 1 of Chapter 44A to create or define the extent of his lien.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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19 April 1979

Subject: Taxation; Intangibles Tax; Money on Deposit; Federal Stock Savings and Loan Associations; G.S. 105-199

Requested by: W. L. Cole, Administrator
Savings and Loan Division
North Carolina Department of Commerce

Question: Is money on deposit with a federal stock savings and loan association subject to intangibles tax?

Conclusion: No.

The 1977 General Assembly for the the first time authorized the creation of stock-owned savings and loan associations under State law, and based upon the method of organization and ownership, the manner of taxing them became different from the manner of taxing mutual savings and loan associations. For example, a mutual association was subject to a capital stock tax and an excise tax, pursuant to Article 8D of the Revenue Act, while stock-owned associations created pursuant to Chapter 54A of the General Statutes became subject to the ordinary corporate income and franchise tax. G.S. 54-1(b). In 1978, G.S. 105-199 was amended, carrying the distinction forward into the intangibles taxation of money on deposit. That statute now provides: "All money on deposit . . . with any . . .stockowned savings and loan association in this State . . . shall be subject to an annual tax. . . ."

In addition to mutual and stock savings and loan associations created under state law, mutual and stock associations may also be created under federal law, 12 USC §1461 et seq., and the question has now arisen as to whether money on deposit in federal stock savings

and loan associations is subject to the intangibles tax.

There are three areas of concern which must be considered in answering the question: (1) did the General Assembly intend to restrict G.S. 105-199 to deposit only in State-chartered stockowned associations; (2) does 12 USC §1464(h) preclude taxing deposits in federal stock-owned associations; (3) is the tax on such associations otherwise proscribed?

We are satisfied that the language of G.S. 105-199 applies, and was intended to apply, to *all* stock-owned associations, both State and federal. G.S. 105-199 speaks of "stock-owned savings and loan associations". The amendment to G.S. 105-199 was adopted months after the enactment of Chapter 54A, and was in no sense part of that "package". In fact, it would seem to be the intention of the Legislature to avoid discriminating between State and federal stock-owned associations in the area of intangibles tax by treating them equally; it was surely not their intention to discriminate against State-chartered associations by levying a tax on their deposits, but not on deposits in similar federal associations.

The federal law under which federal associations are created contains the following limitation on State taxing authority, which must be dealt with:

> "No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." 26 USC §1464(h).

The tax levied by G.S. 105-199 is not a tax upon the association but a tax upon its depositors, which in some instances the association pays *as agent for* such depositors. In an analogous situation, Massachusetts levied an income tax on income from such deposits, and the Massachusetts court reasoned, correctly we believe, that with reference to 26 USC §1464(h), "the tax now assailed does not offend this provision because it was not assessed upon the association or its property. . . . A tax upon the association is different from

a tax upon its customers, depositors and shareholders." *Commissioner v. Flaherty* (1940) 306 Mass. 461, 28 NE 2d 433, cer. den. 312 US 680, 61 S. Ct. 450, 85 L. Ed. 1119. In short, the scope of § 1464(h) reaches only taxes on associations and their properties. It does not reach taxes upon depositors.

Unfortunately, that conclusion does not dispose of the question in its entirety, because the Massachusetts court went on to say:

> "The appellee does not challenge the authority of the Commonwealth to lay a tax on income received by shareholders in a federal savings and loan association, but contends that the receipt of such income cannot be taxed if no tax is laid upon the receipt of similar income by the shareholder of a co-operative bank. . . . The tax discriminates against the income received from a federal fiscal agency and in favor of income received from State co-operative banks. Such an exercise of the taxing power cannot be sustained." (citing cases) *Commissioner v. Flaherty, supra.*

The same observation must be made here. It is of no moment under federal law that State and federal *stock-owned* associations are taxed the same, or that State stock-owned associations may be treated adversely if federal stock-owned associations' deposits are not subject to the tax. The important consideration is that deposits with a state *mutual* association, in competition with a federal stock-owned association, are not subject to tax and that consideration impels the conclusion that such a distinction is a proscribed discrimination under federal law.

It seems clear that the General Assembly intended no such result, but we must advise that the tax imposed by G.S. 105-199 may not be applied to deposits in federal stock-owned savings and loan associations.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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1 May 1979

Subject: Public Officers and Employees; Notary Public; Dual Office Holding; Article VI, Session 9, N. C. Constitution; Holding Three Public Offices Concurrently

Requested by: E. Murray Tate, Jr.
Hickory City Attorney

Question: Is a notary public a public officer, and if so, may the notary hold one appointive office with a city and one appointive office with a county concurrently.

Conclusion: A notary public is a public officer. A notary public may hold one other appointive or one other elective office concurrently. However, a notary may not hold three public offices concurrently.

The facts indicate a person is a notary public and also holds one appointive office with a city and one appointive office with a county. The question arises as to whether this person is holding three public offices in violation of Article VI, Sec. 9 of the North Carolina Constitution.

Article VI, Sec. 9 provides that the responsibilities of self-government be widely shared among the citizens of the State, and that the potential abuse of authority inherent in the holding of multiple offices by one person shall be avoided. No person holds any office under the United States, or any department thereof, or under any other state or government, shall be eligible to hold any elective office in this State.

Sec. 9 further provides that no person shall hold concurrently:

(1) Any two offices in this State filled by election of the people.
(2) Any two or more appointive offices, or any combination of elective and appointive offices, except as the General Assembly shall provide by general law.

Sec. 9 also contains an exception, to-wit: "The provisions of this Section shall not prohibit any . . . notary public . . . from holding concurrently another office under this State or the United States or any department thereof."

By general law, the General Assembly enacted G.S. 128-1.1, which authorizes any person who holds an appointive office in State or local government to hold concurrently one other appointive or elective office. Also, any person who holds an elective office under either State or local government may hold concurrently one other appointive office under State or local government.

In North Carolina, a notary public is a public officer. *Harris v. Watson*, 201 NC 661, 161 SE 215 (1931): *State v. Knight*, 169 NC 333, 85 SE 418 (1915); *Nelson v. Comer*, 21 NC App. 636 (1974).

Although we find no North Carolina cases construing Article VI, Sec. 9 with respect to a notary, the advisory opinion of In Re *Yelton*, 223 NC 845, is helpful since it dealt with the similar exceptions to Article XIV, Sec. 7 of the Constitution of 1868 relating to dual office holding.

The language of the exception in Article VI, Sec. 9 clearly indicates that a notary public may hold *another office* concurrently. Thus, even if the General Assembly had not enacted G.S. 128-1.1, by force of the Constitution, a notary public could hold concurrently one other office without being in violation of the dual office prohibition of Se. 9. The General Assembly in G.S. 128-1.1 authorizes a person to hold two appointive offices or one elective and one appointive office concurrently.

Thus, we conclude that a person, pursuant to the exception contained in Article VI, Sec. 9 of the Constitution may hold concurrently the office of notary public and one other appointive office.

A person who holds the office of notary public may not hold concurrently two or more other offices since he would then hold more offices than is permitted by the Constitution.

For your information, we feel that since the person is holding more than two offices, that his attempt to accept the third office was void and he was neither a defacto or de jure officer in the third office. *Edwards v. Board of Education*, 235 NC 345, 70 SE 2d 170 (1952).

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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7 May 1979

Subject: Motor Vehicles - D.U.I. G.S. 20-179(a)(3)

Requested by: Honorable George M. Britt
Chief District Judge
Seventh Judicial District

Question: May a fee charged for an alcohol rehabilitation course offered pursuant to G.S. 20-179(a)(3) be imposed by the Court as a part of the cost and collected by the Clerk and distributed to the provider of the rehabilitation course?

Conclusion: No.

Article 28 of Chapter 7A of the General Statutes provides for uniform cost in the trial divisions (7A-304 et seq.) and the fees required to attend an alcohol or drug rehabilitation program do not fall within the preview of the statute. Neither could such fees be accessed as fines without running afoul Article IX, Sec. 7 of the North Carolina Constitution.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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11 May 1979

Subject: Counties; Power to Acquire Property; Deed of Gift to County

Requested by: William F. Marshall, Jr.
Stokes County Attorney

Questions:

1. At what point is a county deemed to have validly accepted a conveyance of real property?

2. Where a deed was dated and signed by the grantors in 1968, will a county be deemed to have acquired the property prior to formal acceptance by the board of county commissioners in 1973?

Conclusions:

1. Upon acceptance by the county board of commissioners.

2. No.

Pursuant to G.S. 153A-158, counties may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, and interest in real property for use by the county. G.S. 153A-11 directs that the inhabitants of each county shall be a corporation vested with full property rights, including the power to acquire and hold real property. G.S. 153A-12 requires that each power, right, duty, function, privilege and immunity of the corporation be exercised by the board of commissioners. Thus, it follows that acceptance of real property by a county requires an action by the board of commissioners.

According to the facts made available, Stokes County applied for a matching grant from the Bureau of Outdoor Recreation in 1971. The County was allowed to contribute its matching share by either cash or property, however, if property was used it was required to be acquired after project approval by the Bureau of Outdoor Recreation. The project was approved on April 24, 1973, and on June 4, 1973, the Board of Commissioners of Stokes County

formally accepted, by deed of gift, a piece of property to be used as the County's matching share. This deed was properly registered on June 14, 1973, by the Register of Deeds of Stokes County. The Bureau of Outdoor Recreation subsequently reviewed this grant and took the position that Stokes County had actually acquired the property in 1968, thereby violating the grant conditions. Stokes County was thereafter requested to refund the initial grant of $14,078.50.

The basis for the Bureau of Outdoor Recreation's decision was the fact that the deed to the property conveyed to Stokes County was dated October 15, 1968, and was executed by the appropriate parties within two months of that date. Stokes County takes the position that as the deed was not delivered and formally accepted by the Board of Commissioners until June, 1973, there was no acquisition by the County until well after final project approval by the Bureau of Outdoor Recreation.

It is well established that a conveyance of land by deed becomes effective when the instrument is signed, sealed and delivered to the grantee. *New Home Bldg Supply Co. v. Nations*, 259 N.C. 681 (1963). Delivery is essential to the validity of a deed in North Carolina, *Williams v. North Carolina State Board of Education*, 284 N.C. 588 (1973), however, the grantee must indicate acceptance before the deed becomes effective. *Ballard v. Ballard*, 230 N.C. 629 (1949). As G.S. 153A-12 requires that each function of the county be exercised by its board of commissioners, there could be no acceptance of the deed by Stokes County until formal action was taken by the Board of County Commissioners.

The deed of gift was therefore accepted on June 4, 1973, by resolution of the Board of County Commissioners. As project approval was finalized by the Bureau of Outdoor Recreation on April 24, 1973, we are of the opinion that Stokes County has complied with the grant requirement that only after-acquired property be used as the County's matching share.

Rufus L. Edmisten, Attorney General
Grayson G. Kelley
Associate Attorney

16 May 1979

Subject: Constitutional Law; Interstate Commerce; Intoxicating Liquors

Requested by: Honorable Carolyn Mathis, Member North Carolina Senate

Question: A bill which allows the sale in ABC Stores of wine produced from fruit or berries grown in North Carolina in counties which have approved the sale of wine, is now pending in the General Assembly. Would this bill be held constitutional if enacted since it prohibits the sale in ABC Stores of wines produced outside of N.C.?

Conclusions: Yes.

A bill pending in the current session of the North Carolina General Assembly would allow local Boards of Alcoholic Control to permit, in counties where the sale of wine has been approved, the sale, through ABC stores, of wines "derived from fruits and berries grown in North Carolina."

Three provisions of the Constitution of the United States are relevant to a determination of whether the proposal would be held constitutional: the Commerce Clause, Article 1, Section 8, cl. 3.; the Fourteenth Amendment; and the Twenty-first Amendment. "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 377 U.S. 324, 332 (1964).

The interplay between these provisions was described by Mr. Justice Frankfurter, concurring, in *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 300-301 (1945) as follows:

> "The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the

> constitutional relations between the States and national authority. Before that Amendment–disregarding the interlude of the Eighteenth Amendment–alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a state to control, and to control effectively, the traffic and liquor within its borders....
>
> As a matter of constitutional law, the result of the Twenty-first Amendment is that a state may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a state chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues...."

Judged under the Commerce Clause, the proposal appears to be unconstitutional as a discrimination against interstate commerce in that it authorizes the sale of wines produced from North Carolina agricultural products but not the sale of wine produced from the agricultural products of any other state. The bill opens to wine made of North Carolina agricultural products the marketing power of sellers (city and county ABC stores) unavailable to the producers and distributors of wines derived from the agricultural products of any other state. These sellers are now unavailable to the producers or distributors of any wine; therefore, an allowance to these sellers to offer for sale wines manufactured from North Carolina agricultural products discriminates against the wines manufactured from the agricultural products of any other state or nature. *American Motors Sales Corporation v. Division of Motor Vehicles*, 592 F. 2d 219 (1979). In our view, however, a court called upon to determine the constitutionality of this bill would determine its constitutionality under the standards of the Twenty-first Amendment rather than the standards of the Commerce Clause.

In *State Board of Equalization v. Young's Market*, 299 U.S. 59 (1936) certain wholesalers of beer challenged a statute of the State of California which required them to pay a license fee of $500.00 for the privilege of importing beer produced outside California. The license fee did not apply to persons selling beer produced in California. The plaintiffs claimed that the license fee violated the Commerce Clause by discriminating against the wholesaler of imported beer, (e.g., beer brewed in North Carolina). The Supreme Court said:

> Can it be doubted that a state might establish a state monopoly on the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?... There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?"

In *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401 (1938) a wholesaler of liquor challenged an Indiana statute which prohibited the sale of certain imported brands of liquor but did not apply to liquor produced in Indiana. The wholesaler claimed that the prohibition on selling these liquors violated the Fourteenth Amendment. The Supreme Court held:

> "The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. For only that locally processed may be sold regardless of whether the brand has been registered. That under the Twenty-first Amendment discrimination against imported liquor is permissible *although it is not an incident of reasonable regulation of liquor traffic,* was settled by *State Board of Equalization v. Young's Market Corporation*, 399 U.S.

59, 62, 63, 57 S.Ct. 77, 78, 79, 81 LE.d. 38." (Emphasis supplied)

The same result was reached in *Indianapolis Brewing Company v. Liquor Control Commission of Michigan*, 305 U.S. 391 (1939) and *Joseph S Finch & Company v. McKittrick*, (1939). Thus, a State may discriminate against an interstate alcoholic product, even though the motivation for the preference of the intrastate alcoholic beverage product is motivated by local economic interests and has no relationship to the interest of the State in alcohol regulation.

The Supreme Court has recently cited the *Young's Market* and *Mahoney* cases with approval, *Craig v. Boren*, 429 U.S. 190 (1976), but pointed out that "...(B)oth cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear . . . and touched upon merely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment, ..."

In summary, it is clear that the Twenty-first Amendment supplants the Commerce Clause with respect to intoxicating liquors to the extent of legislation valid under State Constitutions concerning the regulation of commerce in intoxicants. Where the only claim to be made against a state statute regulating commerce in intoxicants is that it discriminates against liquors produced out of state and in favor of those produced within the State, the statute will be held valid under the "rational relationship to permissible state purpose" standard of review under the Fourteenth Amendment. We therefore conclude that this bill, if enacted, would be held to be constitutional under the Twenty-first Amendment against a challenge based on a theory of the Commerce Clause or the economic consequences of equal protection.

Rufus L. Edmisten, Attorney General
Howard A. Kramer
Deputy Attorney General for Legal Affairs
David S. Crump
Special Deputy Attorney General

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17 May 1979

Subject: State Departments, Institutions and Agencies; Purchase and Contracts; Consultant Contracts

Requested by: Thomas E. Todd
State Purchasing Officer
Department of Administration

Questions: 1. Are State agencies required to obtain the approval of the Governor before contracting for consultant services with the Research Triangle Institute?

2. Can State agencies contract for consultant services with the Research Triangle Institute without complying with the general purchase and contract law and rules of the Advisory Budget Commission adopted pursuant thereto?

Conclusions: 1. No.

2. No.

Article 3C of Chapter 143 of the General Statutes places certain restrictions on State agencies desiring to obtain consultant or advisory services from outside contractors. Prior to contracting for such services, the proposed contract is required to be approved in writing by the Governor - G.S. 143-64.20(b). Under G.S. 143-64.22, all consultant contracts made by State agencies must be made with other State agencies if there is an agency available to perform such services. Where no State agency can provide the necessary services, the Department of Administration is required to assure that competition, if available, is sought with the contract being awarded to the State's best advantage. G.S. 143-64.22.

G.S. 143-64.24 makes certain exemptions from the provisions of Article 3C. Included among these exemptions is the Research Triangle Institute. The question which has arisen is whether or not

State agencies and institutions proposing to contract with the Research Triangle Institute for consultant services are required to comply with Article 3C and obtain the approval of the Governor.

The Research Triangle Institute is a private, non-stock, non-profit, charitable and educational corporation organized by the Chairmen of the Boards of Trustees and the Presidents of the Consolidated University of North Carolina and Duke University to conduct research and operate in close proximity with the consolidated University of North Carolina and Duke University. Nothing in the General Statutes, nor in the Articles of Incorporation of the Research Triangle Institute, supports the proposition that the Research Triangle Institute should be considered a State agency as defined by G.S. 143-64.20.

The primary thrust of Article 3C is to require approval of the Governor before State agencies contract with non-State sources for consultant services. G.S. 143-64.24, as originally enacted in 1975, exempted from this requirement the General Assembly, special study commissions, the Institute of Government, and attorneys and physicians performing contractual services for the State. A 1977 amendment added the Research Triangle Institute to this list of exemptions. As the Research Triangle Institute is a private corporation, the General Assembly could not have required it to obtain the Governor's approval before it contracted for consultant services. Therefore, the only reason for the inclusion of the Research Triangle Institute among the list of exemptions would have been to exempt State agencies from complying with Article 3C when such agencies contract with the Research Triangle Institute for consultant services.

The second question is whether or not State agencies are required to comply with Article 3 of Chapter 143 (the general Purchase and Contract law) when they desire to contract directly with the Research Triangle Institute.

Although G.S. 143-64.24 exempts State agencies dealing with the Research Triangle Institute from the requirements of Article 3C, such agencies are still required to comply with Article 3 and the rules of the Division of Purchase and Contract as approved by the Advisory Budget Commission. Under this construction, State

agencies proposing to contract with the Research Triangle Institute are required to comply with regulations approved by the Advisory Budget Commission pertaining to the procurement of contractual services.

We note in conclusion that the exemption raises questions regarding the applicability of Article I, §32, Constitution of North Carolina, prohibiting private emoluments. Constitutionality will be presumed until the contrary clearly appears. *In Re Truitt*, 269 N.C. 249 (1966).

Rufus L. Edmisten, Attorney General
T. Buie Costen
Special Deputy Attorney General

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23 May 1979

Subject: Criminal Law and Procedure; G.S. 15A-1411; Motion for Appropriate Relief

Requested by: Honorable Robert Earl Williford
District Court Judge

Question: Can the court grant a defendant who is qualified a limited driving privilege on defendant's motion for appropriate relief under G.S. 15A-1411 et seq. filed more than ten days after the date of trial, at which trial the defendant was convicted of driving under the influence?

Conclusion: No, except where the defendant qualifies under the provisions of G.S. 15A-1415(b).

G.S. 15A-1415(b) reads:

> "(b) The following are *the only grounds* which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served." (Emphasis added)

It should be noted that the 10 days run from the date of entry of judgment and is not dependent on the length of term.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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25 May 1979

Subject: Public Records; Teachers' and State Employees' Retirement System

Requested by: E. T. Barnes, Director
Retirement and Health Benefits Division
Department of State Treasurer

Question: Is the Retirement and Health Benefits Division of the Department of the State Treasurer required to disclose information in an individual Retirement System member's account to someone other than that member?

Conclusion: Yes.

Information contained in the Retirement System account of an individual member constitutes documents, papers, letters, electronic data-processing records, or other documentary material made or received pursuant to law in connection with the transaction of public business by the Retirement System. As such, such information clearly falls within the definition of "public records" contained in G.S. 132-1.

Under G.S. 132-9, any person, without regard to whether such person has an interest in the records or a particular need for the

records, may apply for a court order compelling disclosure upon denial of access to public records for purposes of inspection, examination, or copying. Consequently, the clear intent of Chapter 132 of the General Statutes is that public records shall be available to anyone for inspection, examination, and copying at reasonable times and places.

There is no statutory provision relating to any of the state-administered retirement systems which makes those records, or any part of those records, confidential or exempt from the Public Records Act, Chapter 132 of the North Carolina General Statutes. Therefore, any person is entitled to request and receive access to public records for purposes of examination, inspection, and copying. This is true even though a person may request information relating to an individual member's retirement account and even though those matters may be ones which the individual member might desire and expect to be treated as private or confidential information.

The rules of the Retirement and Health Benefits Division include a regulation providing that the Retirement System shall not publicly disclose individual retirement benefits. 20 NCAC 2B .0209. However, that rule cannot control over legislation duly enacted by the North Carolina General Assembly. Since the rule providing that individual retirement benefits shall not be publicly disclosed conflicts with Chapter 132 of the North Carolina General Statutes, it cannot be enforced. Any person seeking information concerning individual retirement accounts is entitled to access to those records under G.S. §132-1 and G.S. §132-9.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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25 May 1979

Subject: Public Officers; Filing Notice of Appointment to Public Office; Chapter 477, Session Laws of 1979; Counties

Requested by: P. Eugene Price, Jr.
Forsyth County Attorney

Question: Is Chapter 477, Session Laws of 1979, which requires notice of appointment to public offices applicable to appointments made by a county board of commissioners?

Conclusion: Yes. If the appointments made by the board of county commissioners are to a *State* Commission, council, committee, board, occupational licensing board, board of trustees, including trustees of constituent institutions of The University of North Carolina, Community Colleges and technical institutes created under G.S. 115A-7, or any other State agency where the appointee is entitled to draw subsistence, per diem, of travel allowances from funds deposited with the State Treasurer, or from any other funds subject to being audited by the State Auditor, notice is required.

The statute is not applicable to local offices generally, but there may be some appointments subject to the Act. For example, county commissioners appoint members to the board of trustees of technical institutes under Chapter 115A and such are subject to Chapter 477, Session Laws of 1979.

This opinion will not attempt to enumerate the various appointments by county commissioners which would come within the coverage of the Act, but each appointment should be measured against the definition of public office in G.S. 143-35(2) to determine whether the Act is applicable.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

5 June 1979

Subject: Armed Forces; North Carolina National Guard; Eligibility of North Carolina National Guardsmen injured while attending summer training camp to benefits provided under the North Carolina Workmen's Compensation Act and G.S. 127A-108.

Requested by: Lieutenant J. S. Powell
Benefits and Safety Officer
North Carolina Department of Crime Control and Public Safety

Questions:

1. Is a North Carolina National Guardsman who is attending a summer training camp as required by Federal law and who receives full time duty pay plus the payment of all medical expenses from the federal government as a result of an injury sustained at the camp also entitled to receive workmen's compensation benefits from the State?

2. Notwithstanding the payment for disability and medical expenses by the federal government, should the North Carolina Department of Crime Control and Public Safety submit an Industrial Commission Form 19 (Employee's report of injury to Employer) when a guardsman is injured while attending summer training camp as required by federal law?

3. Assuming that a member of the North Carolina National Guard receives an injury by accident under such circumstances and conditions as would entitle him to benefits under the provisions of both the Workmen's Compensation Act

as well as under G.S. 127A-108, what guidelines should be used in computing those benefits?

Conclusions:

1. No. G.S. 97-2(2) expressly excludes from the provisions of the North Carolina Workmen's Compensation Act members of the North Carolina National Guard who are injured by accident when called into service of the United States.

2. No. While it might be advisable for the Department of Crime Control and Public Safety to prepare a Form 19 and place it in its own files for record keeping purposes, G.S. 97-92 does not require the filing of such a form with the Industrial Commission under circumstances when the National Guardsman is not considered an employee of the State of North Carolina for purposes of the Workmen's Compensation Act.

3. All payments of benefits, including payments of medical expenses, should first be computed under the provisions of the Workmen's Compensation Act. The payments as provided under G.S. 127A-108 should then be computed for payment, deleting therefrom the amounts paid under the Workmen's Compensation Act.

G.S. 97-2(2), in pertinent part, provides:

> "The term 'employee' shall include members of the North Carolina National Guard, *except when called into the service of the United States*, ... and members ... shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor." (Emphasis added)

G.S. 97-2(2) therefore specifically provides that a member of the North Carolina National Guard is not considered a State employee for purposes of the Workmen's Compensation Act while called into the service of the United States.

32 U.S.C. 318 provides that a member of the National Guard is entitled to hospital benefits pay and allowances, pensions and other compensation provided for a member of the Regular Army of the United States of corresponding grade and length of service whenever he is *called or ordered* to perform training under Sections 502 and 503 of this Title and is disabled in the line of duty from disease or injury while so employed.

32 U.S.C. 502 and 503 provide that under regulations of the Secretary of the Army a member of the National Guard shall be required to attend or participate in various drills or field exercises as set out therein.

Under the facts presented, the injured National Guardsman has received his full time duty pay, payment of medical expenses plus other extended benefits from the federal government as a result of an injury received while attending a required two-week summer training camp. The federal government, therefore, in providing the injured guardsman these benefits, has apparently treated the guardsman as being called or ordered to attend the camp by the Secretary of the Army pursuant to 32 U.S.C. 318, 502 and 503.

Therefore, since the guardsman is being treated by the federal government as if he has been called into the service of the United States and is being provided his full pay and other benefits as a result of his injury, it follows that under G.S. 97-2(2) he should not be considered a State employee and entitled to receive duel benefits under the provisions of the North Carolina Workmen's Compensation Act. Certainly, our Workmen's Compensation Act was not intended to provide a National Guardsman, or any other employee, double benefits.

G.S. 97-92, in pertinent part, provides:

> "(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, *received* by his

> employees *in the course of their employment* on blanks approved by the Commission." (Emphasis added)

G.S. 97-92, therefore, requires an employer to file a Form 19 whenever an employee is injured in the course of his employment with the employer. However, since under the facts presented herein the National Guardsman would not be considered a State employee under the provisions of the Workmen's Compensation Act at the time of his injury, the Department of Crime Control and Public Safety should not be required to complete and file an Industrial Commission Form 19 with the Commission. It might be advisable, however, to complete and retain a Form 19 in the file on the guardsman for purposes of future reference to the circumstances of this incident and the denial of benefits to him by the Department.

G.S. 127A-108, which provides for certain benefits to a member of the North Carolina National Guard who without fault or negligence on his own part is disabled through illness, injury, disease contracted or incurred while on duty or by reason of his duty in the service of the state, provides, in pertinent part, as follows:

> "Nothing herein shall in anyway limit or condition any other payment to such member as by law may be allowed: Provided, however, any payments made under the provisions of Chapter 97 of the General Statutes or under federal statutes...shall be deducted from the payments made under this section."

G.S. 127A-108 specifically provides that any payments made under the provisions of Chapter 97 of the General Statutes, the North Carolina Workmen's Compensation Act, shall be deleted from any payments made under this section. It follows, therefore, that Chapter 97 should be considered the primary provider over the provisions of G.S. 127A-108 in cases involving job-related injuries for guardsmen and that, therefore, payments should first be computed and made under that chapter. The payments as provided under G.S. 127A-108 should then be computed, deleting therefrom as credit any payments previously made under Chapter 97.

Rufus L. Edmisten, Attorney General
Ralf F. Haskell
Assistant Attorney General

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15 June 1979

Subject: Abortions, Physicians; Performance of Abortion After 20 Weeks of Gestation

Requested by: Lewis H. Nelson, M.D.
Assistant Professor
Bowman Gray School of Medicine

Question: If a woman at 22 weeks of gestation is found to have a genetically abnormal fetus which will be severely mentally retarded and/or will not survive beyond the first year of life, can an abortion be performed in North Carolina for these reasons alone upon request of the woman?

Conclusion: No.

In North Carolina, statutory prohibitions against abortion take two forms: prohibition against destroying an unborn child (G.S. 14-44), and prohibition against producing a miscarriage or injury to a pregnant woman (G.S. 14-45). Significantly, most abortion litigation has been characterized by controversy over the dual considerations of the rights of the mother as contrasted with any rights of the unborn child. G.S. 14-44 and G.S. 14-45 would seem to reflect recognition of these two areas of consideration by the General Assembly. Interestingly – and possibly indicative of the different gravamen of the two offenses statutorily created – the former offense is punishable by imprisonment extending up to ten years while the latter can bear up to five years imprisonment.

However, G.S. 14-45.1 sets forth exceptional situations wherein licensed medical doctors would be relieved of criminal liability in the performance of abortions. During the first 20 weeks of

pregnancy, an abortion can be performed under statutorily prescribed conditions by a medical doctor upon request by a woman for any reason – or stated differently, without any statement of reason by the woman. See, G.S. 14-45.1(a) and 46 N.C.A.G. 119 (1976).

On the other hand, G.S. 14-45.1(b) provides as follows:

> "Notwithstanding any of the provisions of G.S. 14-44 and G.S. 14-45, it shall not be unlawful, after the twentieth week of a woman's pregnancy, to advise, procure or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital licensed by the Department of Human Resources, *if there is substantial risk that continuance of the pregnancy would threathen the life or gravely impair the health of the woman.*" (Emphasis supplied)

Presumably the differences in the authorization of abortions in G.S. 14-45.1(a) and G.S. 14-45.1(b) are based upon the United States Supreme Court's recognition of an altered picture on the question of abortion at the time of possible viability of a fetus. *See, Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

From the above-quoted statutory language, it is apparent that after the twentieth week of gestation, the prognosis of the condition of the expected child, as described in the question, *standing alone* will not serve to authorize an abortion under governing North Carolina Statutes.

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William F. O'Connell
Special Deputy Attorney General

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18 June 1979

Subject: Motor Vehicles; Failure to Decrease Speed; N.C.G.S. §20-141(m)

Requested by: Ms. Mary Claire McNaught
Public Safety Attorney
Winston-Salem, N. C.

Question: Does N.C.G.S. §20-141(m) create a criminal offense of failure to decrease speed as necessary to avoid a collision as well as a "standard of care" in establishing civil negligence?

Conclusion: Yes.

N.C.G.S. §20-141(m) does create a criminal offense of failure to decrease speed as necessary to avoid a collision which N.C.G.S. §20-176(a) declares a misdemeanor punishable under N.C.G.S. §20-176(b) "by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than 60 days, or by both such fine and imprisonment."

N.C.G.S. §20-141(m) provides:

> "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or enter the highway, and to avoid injury to any person or property."

N.C.G.S. §20-176 penalty for misdemeanor (a) provides:

> "It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Article unless such violation is by this Article or other law of this State declared to be a felony."

N.C.G.S. §20-141 establishes the legal speed restrictions for North

Carolina. Subsections (m) establishes a mandatory duty to decrease the speed of a vehicle to avoid a collision even though the speed is lower than the legal limit. Subsection (m) is a safety statute enacted by the legislature for the public welfare. The legislature in passing this safety statute had the intent of making a violation of the duty a criminal offense thereby shifting to the individual the burden to know whether his conduct is within the statutory requirements. See *Poultry Co. v. Thomas*, 289 N.C. 7 (1975).

The predecessor of N.C.G.S. §20-141(m) was found in N.C.G.S. 20-141(c) (1965).

> "The fact that the speed of a vehicle is lower than the (statutory) limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

Former subsection (c) was not reincorporated in N.C.G.S. 20-141 when it was rewritten, 1973 Session Laws, Chapter 1330 §7, effective 1 January 1975, but was held in *State v. Gainey*, 292 N.C. 627 (1977) to be encompassed in N.C.G.S. 20-141(a) (1975) and thus to still constitute a valid standard for criminal conduct. The legislature amended N.C.G.S. §20-141 in 1977 adding subsection (m) which substantially restates the prior law. This Office has previously ruled that former subsection (c) created a criminal offense of failure to decrease speed to avoid a collision. See, Opinion of the Attorney General, May 1, 1969.

The safety statutes do prescribe a standard of care that is applicable for civil negligence. *Davis v. Imes*, 13 N.C. App. 521 (1972).

Violations of the safety statutes may also constitute a criminal violation if the violation occurred in a criminally or culpably negligent manner and was the proximate cause of injury, *State v. Gainey*, 292 N.C. 627 (1977). Criminal or culpable negligence requires something more than actionable negligence in the law of torts, *State v. Massey*, 271 N.C. 557 (1967).

N.C.G.S. §20-141(m) therefore establishes a duty that by intent and precedent can support either or both civil and criminal actions.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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21 June 1979

Subject: State Departments, Institutions, Agencies; Department of Administration; Office of State Personnel; Relationship between Department of Administration and Office of State Personnel

Requested by: Harold W. Webb
State Personnel Director

Questions:

1. Given the provisions of General Statutes §143B-370, 126-3, and 143A-34 (repealed by Session Laws 1975, c. 879, s. 46), what is the relationship between the Department of Administration and the Office of State Personnel?

2. Which official, the Secretary of Administration or the State Personnel Director, controls management functions such as planning, organizing, staffing, directing, coordinating, reporting, and budgeting for the Office of State Personnel?

Conclusions:

1. The Office of State Personnel is a largely independent agency placed under the umbrella of the Department of Administration for organizational purposes only.

2. The State Personnel Director controls the management functions for the Office of State Personnel.

The Office of State Personnel was established as the State Personnel Department in Chapter 640 of the 1965 Session Laws.

> "§126-3. State Personnel Department established; administration and supervision; appointment, compensation and tenure of Director.-There is hereby established the State Personnel Department (hereinafter referred to as "the Department"). The Department shall be separate and distinct from the Department of Administration and shall be under the administration and supervision of a State Personnel Director, (hereinafter referred to as "the Director") appointed by the Board and subject to its supervision. The salary of the Director shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Director shall serve at the pleasure of the State Personnel Board."

In 1975 that provision was amended to read as follows:

> "§126-3. Office of State Personnel established; administration and supervision; appointment, compensation and tenure of Director. -There is hereby established the Office of State Personnel (hereinafter referred to as "the Office") which shall be placed for organizational purposes within the Department of Administration. Notwithstanding the provisions of North Carolina State government reorganization as of January 1, 1975, and specifically notwithstanding the provisions of Chapter 864 of the 1971 North Carolina Session Laws (Chapter 143A), the Office of State

> Personnel shall exercise all of its statutory powers in this Chapter independent of control by the Secretary of Administration and shall be under the administration and supervision of a State Personnel Director (hereinafter referred to as "the Director") appointed by the Governor and subject to the supervision of the Commission for purposes of this Chapter. The salary of the Director shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Director shall serve at the pleasure of the Governor. (1965, c. 640, s. 2; 1975, c. 667, s. 5.)."

The amending statute, Chapter 667 of the 1975 Session Laws, was ratified June 18, 1975, and became effective February 1, 1976. In the interim, however, the State Personnel Department and the State Personnel Board, as they were known at that time, had been transferred to the Department of Administration by a type II transfer in 1971. G.S. §143A-84. Under a type II transfer, the agency was entitled to exercise all its statutory powers independently of the head of the principal department, except that the agency would be administered under the direction and supervision of the principal department with the management functions performed under the direction of the head of the principal department. G.S. §143A-6(b). Management functions were defined to mean planning, organizing, staffing, directing, coordinating, reporting and budgeting. G.S. §143A-6(c).

On June 26, 1975, after the ratification of the new Personnel Act, the General Assembly ratified a reorganization act by which the Department of Administration was placed under the Executive Organization Act of 1973. Session Laws 1975, Chapter 879. That Act, codified as Article 9 of Chapter 143B of the General Statutes, provides that all functions, powers, duties and obligations of certain agencies are transferred to and vested in the Department of Administration, but does not list the Office of State Personnel or Department of State Personnel as being one of the agencies whose functions are transferred to the Department of Administration. G.S. §143B-368. The State Personnel Board is naturally listed as being included in the Department of Administration. G.S. §143B-370. There is no specific provision dealing expressly

with the Office of State Personnel and the State Personnel Board, now the State Personnel Commission, and its relationship to the Department of Administration or its powers and responsibilities within Article 9 of Chapter 143B. G.S. §143B-368 provided that the Department of Administration should have functions eatablished by Article 10 of Chapter 143A, the provisions which were being repealed by Article 9 of Chapter 143B. Article 10 of Chapter 143A, as previously noted, had included the State Personnel Department and the State Personnel Board by a type II transfer to the Department of Administration. However, G.S. §143A-84, transferring the State Personnel Department and State Personnel Board to the Department of Administration by type II transfer, had subsequently been effectively modified by the amendment to G.S. §126-3.

As amended in 1975, G.S. §126-3 provides that the Office of State Personnel shall exercise all of its statutory powers independent of control by the Secretary of Administration. However, as already noted, under Chapter 143A, the Office of State Personnel was already entitled to exercise its statutory powers independent of control by the Secretary of Administration by virtue of having been transferred to the Department of Administration by a type II transfer. Yet G.S. §126-3 includes the phrases "notwithstanding the provisions of the North Carolina state government reorganization provisions as of January 1, 1975, and specifically notwithstanding the provisions of Chapter 864 of the 1971 Session Laws (Chapter 143A)." The word "notwithstanding" must indicate that the Office of State Personnel exercises its powers or authority in a way different from the normal type II transfer. The statute then specifically provides that the Office of State Personnel is under the "administration and supervision of a State Personnel Director" and that it is "subject to the supervision of the Commission for purposes of this Chapter." G.S. §126-3. The clear import of this provision is that the State Personnel Director and Office of State Personnel exercise their responsibilities with more independence from the Department of Administration than would be true without that language. Under a type II transfer, the agency was under the administration and supervision of the head of the principal department, who exercised only management functions over the agency in question. Here, the administration and supervision of the Office of State Personnel is expressly granted to the State Personnel

Director, who is then subject to the supervision of the Commission, not to the supervision of the Secretary of Administration. The clear import of G.S. §126-3, when looked at in conjunction with the statutes relating to the Department of Administration and state government organization generally, is that the Office of State Personnel shall be under the administration and supervision of the State Personnel Director, which means that the State Personnel Director controls the management functions of the Office of State Personnel. Management functions, as already noted, include such matters as planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

The conclusion that the management functions of the Office of State Personnel are entrusted to the State Personnel Director, under the supervision of the State Personnel Commission, is buttressed by the nature of the duties performed by the Office of State Personnel. The Office of State Personnel determines such matters as classification, pay, qualifications of applicants and employees, and grievances of state employees covered by the State Personnel Act. The integrity of that process depends on its independence from influence by any department. The Office of State Personnel is deciding matters as to classification, level of pay for which a person is eligible, whether a person has been unjustly dismissed or demoted or denied a promotion, and other sensitive matters for Department of Administration employees, and applicants for employment with the Department of Administration, just as it does for other departments. It is essential to the integrity of the administration of the State Personnel Act that the Office of State Personnel be "separate and distinct from the Department of Administration," as provided in the 1965 legislation in originally establishing the State Personnel Department as we know it, just as it is separate and distinct from other departments of state government.

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